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LABOR LAW JOURNAL

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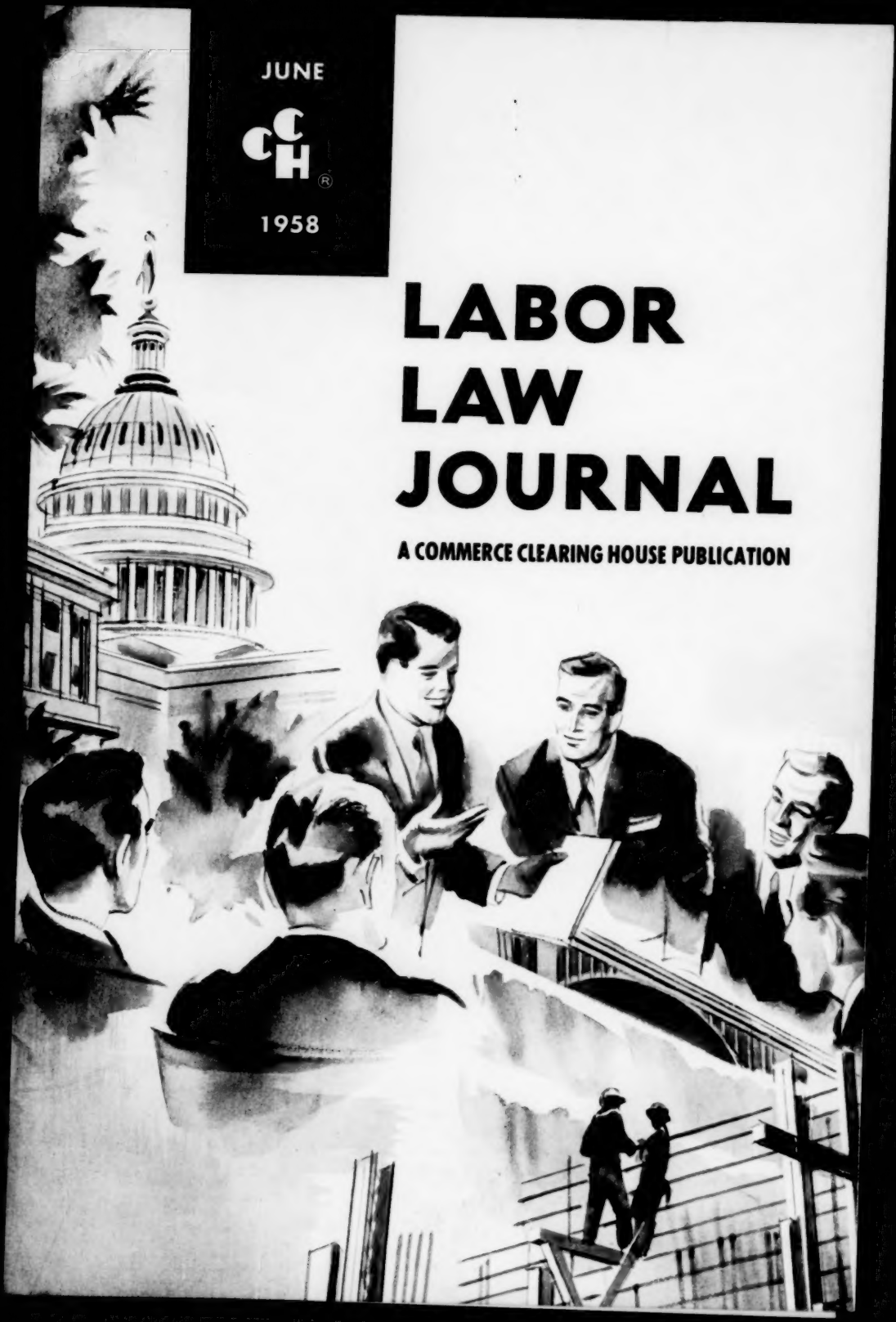

IN THIS ISSUE

In recent decisions the National Labor Relations Board has accepted the concept that arbitration is an extension of collective bargaining, and has indicated that it will require employers and unions to utilize the voluntary machinery that they have created. Bernard Samoff, in his article which begins at page 393, emphasizes the advantages that this administrative remedy has over judicial intervention and legislation.

An objective discussion of the legal and historical background of the right-to-work dispute is presented at page 411. The author, Gordon S. Skinner, notes that the battle is wide open, since each side can call upon some legal precedents to support its position.

A survey of the progress made by unions toward the unionization of government employees is made by Joseph Krislov. His article, which appears at page 421, points out that this progress has been impeded by the unfriendly attitude of governmental authority.

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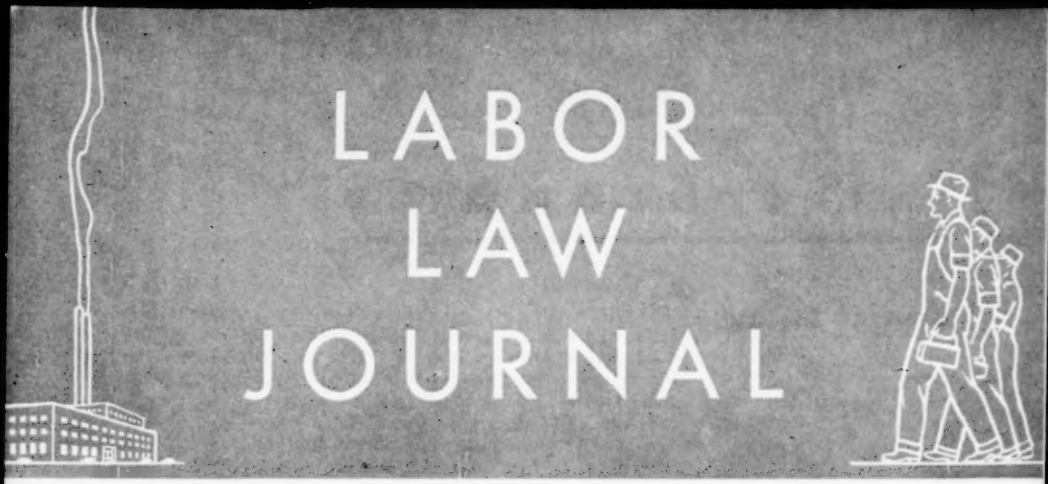

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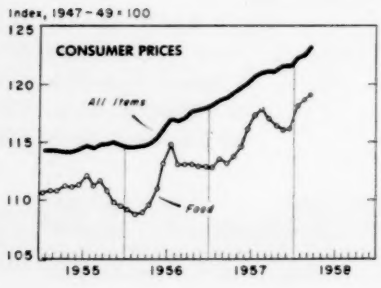
the Economy

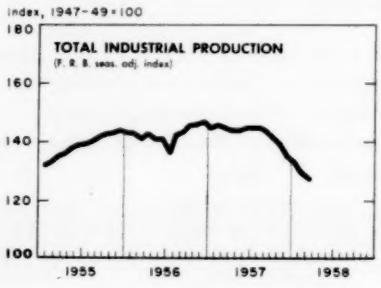
Cost of Living

UP. The cost of living increased by 0.2 index points between March and April, according to figures released by the Bureau of Labor Statistics on May 22, 1958. The increase was largely caused by a seasonal advance in food prices. Prices of housing, medical care and personal care were also higher, but transportation and apparel prices declined. The nation-wide all-items index for April reached a new high of 123.5 (1947-1949=100), 3.5 per cent higher than in April, 1957. The purchasing power of the dollar on the same basis slipped to just under 81 cents.

This rise in the cost of living will result in pay increases of two and three cents per hour for half a million workers under escalator clauses. Involved are workers in the auto parts, farm implement, aircraft, and electrical machinery industries, and employees of local transit lines.

Continued rise of prices is associated with a boom. For that reason, lower prices are associated, in the minds of most people, with a recession. However, a study of the movement of the prices in previous recessions and depressions shows that this is not true. Prices ordinarily do not decline during recessions.





Industrial Production

DOWN. The index of industrial production of the Federal Reserve System continues to slide. It is two points lower for April than it was for March. This seasonally adjusted index stands at 126 per cent of the 1947-1949 average. This is 18 points below a year earlier.

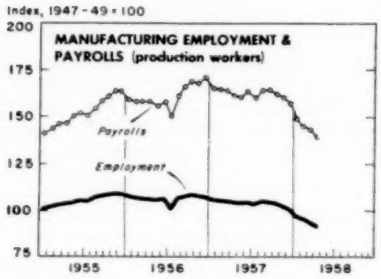
Output of steel and nonferrous metals was curtailed further in April, as metal-fabricating industries continued to liquidate inventories. While below the March average, steel mill operations changed little during April and rose in the first half of May. Activity in most business-equipment lines continued to decline in April, and auto assemblies were reduced further (preliminary schedules for auto production in May indicate

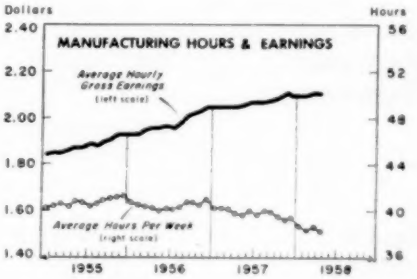
some increase). Output of most major household goods, and also of construction materials, changed little in March and April following declines from the levels of last summer.

Activity in the apparel industry recovered following settlement of the work stoppage which reduced production in March, and output of most other nondurable goods registered little change. Minerals production declined further as coal output was reduced and iron ore mining failed to show the usual spring rise.

Manufacturing Wages and Hours

DOWN. Average weekly earnings in manufacturing were slightly lower in April than in March due to a reduced workweek. Average weekly earnings in manufacturing stand at $80.81. Average weekly hours in manufacturing declined. The average workweek was 38.3 hours, which is slightly shorter than the average workweek in March.





Labor Force

UP. According to the figures of the Council of Economic Advisors, civilian employment in April was 62,907,000. This is slightly above the March figure of 62,311,000. This increase brings about a corresponding decrease in the number of unemployed. The April unemployment figure is 5,120,000, or 7.5 per cent of the civilian labor force. The March figure is 5,198,000, or 7.7 per cent of the civilian labor force. The spring pickup in agricultural employment accounted for most of the 600,000 increase in total civilian employment.

Substantial employment cutbacks were made in the automobile and machinery industries, and in the steel mills. The apparel industry reported less than the usual decline for April, but employment levels in this industry have been comparatively low as a result of a strike in the ladies' garment trade. The leather industry reported sharp cutbacks among producers in footwear.

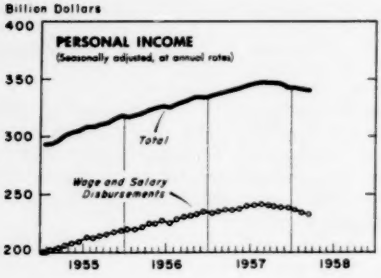
State insured unemployment was up in about half the states between March and April. However, only three states showed sizable increases: Michigan, New York and Pennsylvania.

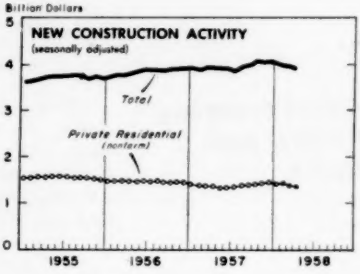
Consumer Credit

DOWN. In March, total consumer credit outstanding declined $500 million to $42,562,000,000. Installment credit repaid again exceeded installment credit extended.

Construction

DOWN. The value of new construction in April reflected a slight decline of 3 per cent from previous months to $47 billion. However, private housing starts rose in April when compared with February and March. Public expenditures for new construction continued at the same rate as in previous months.





Personal Income

UP. Personal income rose slightly in April to a seasonally adjusted rate of $342.8 billion, but this was not brought about by an increase in wages. In fact, wages and salaries decreased about $500 million. The increase in total personal income is attributed to a $1 billion rise in transfer payments.

Stock Prices

UP. Yields on United States Government securities rose in the latter part of April after reaching new lows for the year around the middle of the month. In the first two weeks of May, yields on long-term Treasury issues leveled off, while those on intermediate- and short-term issues turned down again. Yields on corporate and state and local government bonds continued to decline in the latter part of April, then increased slightly in early May. Common stock prices advanced to a new high for 1958.

New corporate security offerings in the first quarter of 1958 amounted to $3.3 billion. Electric and gas companies accounted for one third of the offerings, issuing $1.1 billion of securities. Communication companies accounted for $922 million. This includes a $718 million offering of convertible debentures by A. T. & T. Manufacturing companies issued only $576 million of securities. This is the smallest amount for this group for any quarter in the past four years. This offering reflects declining plant and equipment expenditures and lower working capital requirements. Almost $2.6 billion of the proceeds from all security issues is to be used for capital expenditures, and 75 per cent of this money is to be spent by utility companies.

Strikes

UP. Strike activity in March rose substantially above February, primarily because of an industry-wide work stoppage of more than 100,000 workers in the dress manufacturing industry. New strikes in March totaled 200, idling 165,000 workers. In all, there were 300 strikes in effect during March, involving 200,000 workers who will lose 1.2 million man-days of work.

Labor Relations

Decisions of Courts and Administrative Agencies

An employer could not insist, as a condition to accepting a union contract, that a strike-vote clause be included.—Before it would approve a union contract, an employer demanded that it include (1) a clause calling for a vote by employees on the employer's last offer before the union could call a strike and (2) a clause excluding the international union as a party to the contract. The Board had held that the employer's insistence upon either of these conditions constituted a refusal to bargain. The United States Supreme Court agreed with the Board and reversed a decision by the Sixth Circuit.

The Supreme Court noted that the area of mandatory collective bargaining includes subjects relating to "wages, hours, and other terms and conditions of employment." The parties can insist on the adoption of their position on a subject within the mandatory bargaining area as a condition to acceptance of a union contract. However, outside this area neither party can insist on the adoption of its proposal as a condition to a contract's execution. The strike-vote clause was a permissible, but not a compulsory, subject for bargaining. Therefore, the employer's insistence on this clause was unlawful. Four of the nine Supreme Court Justices dissented on this issue, but all agreed that the employer could not insist that the union contract be signed by a local union alone where its international had been certified.—*NLRB v. Borg-Warner Corporation*, 34 LABOR CASES ¶ 71,492.

A union is liable for the wrongful expulsion of members who exercise their rights to oppose and criticize persons in control of the union.—Certain union members were expelled from a union on charges of dual unionism. However, since the evidence showed that the members had merely formed a group or committee to work within the framework of the union in order to promote the free exchange of ideas and a two-party system within the union, the charges of dual unionism were not sustained. The members

were ordered restored to their former union status and awarded damages against the union.

The New York Court of Appeals held that where a union member is wrongfully expelled by an action on the part of the membership (at a meeting or otherwise) in accordance with the union's constitution, the act of expulsion will be regarded as the act of the union for which damages may be recovered from union funds. It is not necessary that all members of a union authorize or ratify the action of those directly responsible for the expulsion. In the instant case the union was liable since the act of expulsion was taken in accordance with the union constitution.—*Madden v. Atkins*, 34 LABOR CASES ¶ 71,491.

An injunctive decree prohibiting all picketing was violative of the constitutionally guaranteed right of free speech.—On a showing that a union official photographed or pretended to photograph persons crossing a picket line and that there was some use of profanity, an injunctive decree prohibiting all picketing was upheld by the Kansas Supreme Court. The United States Supreme Court summarily reversed this decision. It cited *Thornhill v. Alabama*, 2 LABOR CASES ¶ 17,059, 310 U. S. 88, in which it had first recognized that peaceful picketing was within the protection of the constitutional guarantee of freedom of speech.—*Teamsters, Local 795 v. Newell*, 34 LABOR CASES ¶ 71,468.

The insistence by an employer on contract provisions which would leave the employees in no better position than they were without a contract did not constitute bad-faith bargaining.—An employer stood firm in its demand for union contract provisions which would require the employees to surrender their right to strike; would give the employer the right to change wage rates or grant merit increases, or alter shop rules relating to working conditions without first bargaining with the union over such changes; and would require that matters going to arbitration be decided in the employer's favor unless there was evidence that the employer's position was arbitrary or capricious. However, the evidence indicated that the employer's representatives approached the bargaining table with a full understanding that (1) they were obligated to meet with the union and discuss any terms and conditions of employment put forward by either party, (2) they were required at least to expose themselves to such argument as could be put forward, (3) they were required to seek an area of agreement at least with respect to some terms of employment and (4) if they were able to arrive at an agreement, they were required to reduce it to writing and sign it.

The Fifth Circuit noted that the duty to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession. It concluded that the facts that the employer failed to concede anything substantial and that the contract which it proposed would leave the employees in no better state than they were without a contract were not sufficient grounds for finding that the employer was guilty of bad-faith bargaining. —*White's Uvalde Mines v. NLRB*, 34 LABOR CASES ¶ 71,463.

The fact that a union demanded bargaining for a unit slightly smaller than that later found to be appropriate did not justify an employer's refusal to bargain.—The District of Columbia Circuit recently held that the NLRB acted arbitrarily when it dismissed refusal-to-bargain charges against an employer on the basis that the unit for which the union had demanded recognition was not the appropriate bargaining unit. The evidence showed that the variance between the unit sought and the unit found to be appropriate was not substantial in that the vast majority of the employees were driver-salesmen and those added by the Board to constitute the appropriate unit were employees in training to become driver-salesmen. Thus, the court held that the employer committed an unfair labor practice when it refused to bargain.—*Teamsters, Local 67 v. NLRB*, 34 LABOR CASES ¶ 71,487.

The NLRB refuses to change its jurisdictional yardstick for office-building operators.—An employer, primarily involved in the real estate and brokerage business, had its operations extended into nine states. The employer owned a corporation which in turn owned 33 floors of a 41-story building in Pittsburgh. The employer performed the maintenance work on this building and employed approximately 300 office building service and maintenance employees. One tenant, engaged in interstate commerce, occupied most of the building and paid over $1 million a year for services. A union sought a craft unit of four carpenters who were among the employees engaged in the building's maintenance. The employer contended that its operations did not meet the Board's jurisdictional requirements.

The Board observed that the employer's offices in the building were used solely in connection with its building-management responsibilities and not for its general business. Its offices covered approximately a fifth of one floor. The majority of the Board applied the current jurisdictional yardstick which provides that jurisdiction will not be exercised unless the building operator is otherwise engaged in interstate commerce and also uses the building primarily to house its own offices. Thus, juris-

diction was denied. Members Jenkins and Fanning dissented, stating that the present yardstick should be abandoned since it conflicts with the Board's jurisdictional standard based on the impact of the totality of an employer's operations upon commerce.—*John W. Galbreath & Company*, 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 55,331.

Whether supervisors aided a union in obtaining its showing of interest is no longer a litigable issue in a representation proceeding.—The National Labor Relations Board recently declared that claims that supervisors assisted a union in obtaining its showing of interest (which is a prerequisite for an election petition) will no longer be litigated in representation proceedings. Instead, these claims, like other attacks upon the validity of a showing of interest, will be investigated only administratively by the Board. In the instant case, the Board denied an employer's motion to reopen a hearing for admission of evidence that a union was assisted by a supervisor in obtaining its showing of interest.—*Georgia Kraft Company*, 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 55,358.

An agency-shop contract did not violate the Indiana right-to-work law.—An important decision in Indiana has established the validity of agency-shop contracts even though the state has a right-to-work law. The court (Indiana Superior Court, Lake County) interpreted the law as prohibiting only contracts which require membership in a union and not those which merely require financial support of the bargaining agent. Under an agency-shop agreement, workers are not required to join the contracting union but are required to support it financially.—*Meade Electric Company v. Hagberg*, 34 LABOR CASES ¶ 71,525.

Are Governmental Subdivisions Solely Under NLRB Jurisdiction?

A split of authority has arisen regarding the question of whether governmental subdivisions are subject to the exclusive jurisdiction of the National Labor Relations Board. The Third Circuit and the Board have answered affirmatively while the Wisconsin Supreme Court has answered negatively.

The Third Circuit (*NLRB v. Electrical Workers, Local 313*, 34 LABOR CASES ¶ 71,447, April 17, 1958) held that although a county, as a governmental subdivision of a state, is not an "employer" subject to the Taft-Hartley Act's provisions, it is a "person" entitled to protection from an unlawful secondary boycott. Thus, a remedial order of the National Labor Relations Board was enforced.

Section 2(1) of the Taft-Hartley Act defines "person" as follows:

"The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Section 2(2) of the act specifically excludes the state or a political subdivision from the definition of the term "employer."

(Continued on page 420)

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Federal-State Relations: Enforcing Collective Bargaining Agreements

By BERNARD SAMOFF

When the voluntary arbitration process used to administer labor contracts breaks down, a problem is created. In rejecting legislation and judicial intervention as the solution, the author proposes an administrative remedy. He states that legal adjudication of rights creates more, instead of less, federal-state conflicts. The author is Chief Field Examiner in the Philadelphia NLRB Office. The views expressed herein are the author's and must not be taken as the official pronouncement of the NLRB or its General Counsel.

FEDERAL and state labor law today governing collective bargaining relations, as interpreted and implemented by administrative agencies and the courts, reflects a heightening tempo of federal-state conflicts. Such antagonisms exist, although in almost every other aspect of labor relations and employment there is a notable lack of federal-state discord.[1] Whether the federal government has pre-empted or occupied the field of collective bargaining to the exclusion of the states or both have concurrent jurisdiction or the national government has consented to states' regulation raises basic and controversial issues which place severe strains upon our federal system. Indeed, some believe that in this area even cooperative federalism is unequal to the task.

Out of the wealth of materials illustrating this conflict, a few have been selected to highlight the issues and demonstrate the depth and dimension of the problem. New York State Industrial Commissioner Lubin, speaking before the Association of State Labor Relations Agencies in New York on October 16, 1957, appealed for clarifying legislation on the "tremendously important" question of federal-state jurisdiction. He was challenged by Laurence E. Gooding, chairman of the Wisconsin Employment Relations Board, who asserted that so long as Congress had not indicated the areas that it sought to embrace under its supremacy power, the states were free to apply their statutes to govern such areas.[2] Before another forum composed principally

[1] This excludes picketing and union security which exhibit the same strife found in the enforcement of labor agreements.

[2] *New York Times*, October 16, 1957.

of representatives from state labor departments, Dr. William M. Hepburn of Emory University placed the issue in this context: [3]

". . . again and again under the law we have to face these problems of who has jurisdiction . . . it is characteristic of our society; it is one of the prices we pay for a Federal-State system . . . people who feel there are advantages in dealing with the States alone want State jurisdiction . . . people who feel there are advantages in dealing with the Federal Government . . . wish that jurisdiction to have paramount authority. But people are not all consistent on this. The type of person who today approves of States rights, a generation ago might not have approved it. It seems to depend on where your interest lies at the moment."

From the vantage point of a state court, and with Olympian detachment, Judge Thomas expressed this view: [4]

"In the unending task of integrating the activities of our National Government with those of our State Governments, so necessary if our Union is to be preserved and to endure, no more troublesome problems have confronted the Courts of our country than the problems [federal-state jurisdiction in labor matters] of the type that now faces this Court."

The recent report of the Association of the Bar of the City of New York urges that Congress exercise its plenary power, for otherwise state control would result in the application of nonuniform laws of many states in matters affecting interstate commerce. To allow the states to act, the report asserts, would be an inadequate remedy since only 12 states have passed comprehensive labor legislation. Expressing a contrary view, Secretary of Labor James P. Mitchell proposed federal legislation authorizing the states to act in labor disputes where the federal government did not wish to exercise jurisdiction. [5]

What about this federal-state conflict? Is it inherent in our federal system? One outstanding political scientist believes that such discord is inevitable and is the price we must pay, for he observed: [6]

It is doubtful whether union members are much concerned about the course democracy has taken in their unions, or feel seriously deprived because they do not participate actively in the government of their organizations.—Benjamin M. Selekman, in the *Harvard Business Review*.

"In the labor relations field the confusion consists in having divergent state and national laws regulating collective bargaining and strikes with resulting uncertainty among employers and employees as to which law applies to them. There is also some duplication of state and federal labor relations administration. . . .

"As to the confusion between state and national regulatory laws . . . in the labor relations field, this appears to be an unavoidable consequence of having a federal or two-level system of government."

That such an "unavoidable consequence" is emphasis through understatement is seen by an examination of current literature and court decisions. Indeed, the impact of this federal-state tussle has most affected those who are participants and administrators. The notes struck by Lubin, Gooding, Hepburn, Thomas and Anderson ring heavily upon the anvil of modern federalism.

Enough has been said to demonstrate the critical importance of this federal-state controversy in the broad field of labor law. Here, however, we are concerned only with one facet of this issue—how the enforcement of labor agreements is affected by our federal system. In the remaining portion of this paper I intend to (1) outline the historical setting of the problem, (2) develop the scope of the issue presented by Section 301(a) of the Taft-Hartley Act,[7] (3) describe the nature of arbitration, (4) consider and evaluate proposed solutions for this problem and (5) suggest an answer. I will use "enforcement of agreements" and "arbitration" interchangeably because the latter process is almost the sole method for gaining compliance with contract terms.

[3] United States Department of Labor, Bulletin No. 191, p. 155.

[4] *Standard Oil Company v. Oil, Chemical & Atomic Workers International Union, AFL-CIO, et al.*, 32 LABOR CASES ¶ 70,862 (Ohio Ct. of Comm. Pleas, Cuyahoga Co., July 1, 1957).

[5] *New York Times*, December 8, 1957.

[6] Anderson, *The Nation and the States, Rivals or Partners?* (University of Minnesota Press, 1955) pp. 142 and 143.

[7] It provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

This paper is based upon past [8] and present study of the voluminous literature covering this field, and personal experiences in connection with the administration of the NLRA. Needless to say, much of what is written here cannot be attributed to any specific source, but is a distillation of reading, analyzing and weighing various facets of this issue. Added to this are the many conversations which I have participated in with colleagues, labor and employer representatives, government officials and Professor George W. Taylor. It is hoped that by viewing voluntary arbitration, which is the key to the enforcement of labor contracts, from this perspective we may contrast and compare various solutions and perhaps evolve a solution which is not only consistent with our federal system but also enhances cooperation between the federal government and states.

The number one economic problem of this country is wage inflation, rooted in the excessive monopoly power of unions.—T. O. Yntema, vice president, finance, of the Ford Motor Company.

Historical Setting

The existing federal-state controversy telescopes our age-old federal-state difficulties in handling labor matters. As soon as workers began to organize unions they were confronted with state common law resistance. From the early *Cordwainers* case in 1806 until after the Civil War it was the states alone, through their courts, which governed worker-employer relations. When, in response to the excesses of industrialism, the states enacted legislation affording worker protection, the Supreme Court, under its interpretation of the "due process" and "liberty of contract" clauses in the Fourteenth Amendment, determined that such legislative efforts were constitutionally invalid.[9] This view implied that only federal, not state, law could constitutionally govern worker-employer relations. However, when Congress, acting under its delegated commerce power, passed the Erdman Act in 1898 regulating certain phases of labor-management relations of the railroads, the Supreme Court similarly invalidated [10] this legislation under the Fifth Amendment. Notwithstanding repeated state efforts to enact laws according protection to workers and minimally safeguarding rights to organize unions, the Supreme Court frustrated most of them, over the vigorous dissents of Justices Holmes and McKenna, and later, Justices Brandeis and Cardozo.

This period, from the 1880's to the early 1930's, disclosed no conflict between the federal government and the states in labor matters, but one between the Supreme Court on the one hand and the states and federal government on the other. Yet the entire period from the founding of our country until the 1930's has been called the period of "dual federalism," to use the descriptive phrase coined by Professor Corwin. One aspect of this "dual federalism" was the existence of "tension" between the states and nation.[11] While this was undoubtedly true in other areas, it does not seem to me to be a valid concept in the field of labor matters. To return to our historical picture, we note what happened in the 1930's.

Goaded by the insistent need for worker protection, Congress blazed the trial by enacting constitutionally safe legislation. Many states followed. During the ten-year period from 1935 to 1945, cooperative federalism characterized our federal-state relations. This was the period when the states and federal government literally raced each other to provide a wide variety of legislation favorable to workers and unions. The epitome of federal-state collaboration was achieved with the passage of the social security act. Little was heard about any federal-state conflict. Near the end of this decade, apprehension was expressed about the disintegration of our two-level system. To some it seemed as if the states, as independent sovereign entities, were giving up their constitutional role. Others believed that this period witnessed the flowering of our federal system and that the states, instead of being relegated and supplanted, were gaining new responsibilities. For still others, the establishment of the federal-state complementary old-age and survivors insurance program illustrated the best values of our federal system.

However, underneath these creative energies and the surface calm were the seeds

[8] Samoff and Summers, "The Effect of Collective Bargaining Provisions on NLRB Action," 8 *Labor Law Journal* 676 (October, 1957).

[9] Lerner, "The Supreme Court and American Capitalism," 42 *Yale Law Journal* 688 (1933); Taylor, *Labor and the Supreme Court* (privately printed, 1957); Millis and Montgomery, *Organized Labor* (New York City, McGraw-Hill Book Company, 1945), Vol. III, pp. 486-689.

[10] *Adair v. U. S.*, 208 U. S. 161 (1908).

[11] Corwin, 36 *Virginia Law Review* 1 (1950).

The rule of law is not self-executing. A system of law works no better than it is made to work by the people who administer it.—Attorney General William P. Rogers.

of later federal-state conflicts. All states did not approach this question from the same constructive view, and state legislation differed in degree and kind. Only 12 industrial states passed "Little Wagner Acts," and 29 adopted laws patterned after the Norris-LaGuardia Act. It was in the early years of World War II that the federal-state antagonisms began to emerge.

Morris Glushien, now general counsel of the International Ladies' Garment Workers' Union, AFL-CIO, but then associate general counsel in charge of Supreme Court legislation for the NLRB, recalled his surprise when the issue of federal pre-emption was first presented to him in 1942.[12] Within the next five years more and more voices were raised urging Congress to return to the states their claimed constitutional power to govern labor relations. This half-decade seems to have been characterized, in fields other than labor, by a resurgence of states rights. (It has been opined that states-rights proponents believed that the unions' power could be truncated effectively on the state level because the unions possessed too much political power on the national level.) A concerted and directed campaign was going on to allow the states to exercise their traditional but largely undefined police powers. This groundswell, which some have alleged was cleverly maneuvered by forces hostile to unionism,[13] culminated in the passage of the Taft-Hartley Act.

When, in 1947, Congress turned its hand to amending the ten-year-old Wagner Act (for the first two years—1935 to 1937—with limited employer compliance), Congress sought to deal with federal-state relations by giving explicit powers to the states in dealing with union security. Further, it provided that where the federal and state acts were consistent, the NLRB could cede jurisdiction to the state.[14] The entire tenor of this act evinced Congressional efforts to enlarge the area of state control over labor relations. Because this statute was far more comprehensive than the Wagner Act, conflict with state jurisdiction was inevitable.

In drafting Taft-Hartley, apparently little thought was given to potential federal-state conflicts. (During a recent oral argument about a labor controversy involving federal-state jurisdiction, Justice Frankfurter reportedly leaned over the bench and inquired: "Confidentially, do you think Congress thought about these problems?") Although our consideration here is but one phase of a federal-state problem—enforcement of labor agreements—we should not ignore other federal-state differences in labor matters. To examine the problem posed in this paper, we now turn to the consequences of Section 301(a) of the Taft-Hartley Act. (The text of this section will be found at footnote 7.)

Implementation of Section 301(a)

At first blush, Section 301(a) appears deceptively simple. Yet this seemingly uncomplicated provision for enforcing labor agreements has resulted in a spate of litigation. That is not all. No one is sure where we are going,[15] even though, ten years after Taft-Hartley was passed, the Supreme Court finally passed upon three cases arising under this section. An examination of the principal decision highlights the federal-state issue.

Stated briefly, these three cases[16] required the Court to decide whether labor unions could compel employers, who were parties to collective bargaining agreements and concededly in interstate commerce, to arbitrate disputes arising out of such contracts. It was argued that Section 301(a) did not oust state courts from their traditional power to enforce or refuse to enforce labor agreements, and further that state courts possessed concurrent jurisdiction to grant

[12] Glushien, "Federal Preemption in Labor Relations," 15 *The Federal Bar Journal* 3 (January-March, 1955), at p. 4.

[13] Millis and Brown, *From the Wagner Act to Taft-Hartley* (University of Chicago Press, 1950), Ch. 8, 9 and 10.

[14] While Taft-Hartley, in the Section 10(a) proviso, invited compatible legislation, no state has enacted such a law since 1947. Katz, "Two Decades of State Labor Legislation: 1937-1957," 8 *Labor Law Journal* 747 (November, 1957).

[15] For a partial list of the considerable literature analyzing and commenting upon court decisions under Section 301(a), see footnote 112, p. 695, of the article cited at footnote 8.

[16] *Textile Workers Union of America v. Lincoln Mills of Alabama*, 32 LABOR CASES ¶ 70,733, 353 U. S. 448 (1957); *General Electric Company v. Local 205 (UE)*, 32 LABOR CASES ¶ 70,735, 353 U. S. 547 (1957); *Goodall-Sanford v. Textile Workers Union*, 32 LABOR CASES ¶ 70,734, 353 U. S. 550 (1957).

Inflation begets boom, boom begets recession and recession begets the demand for more inflation.
—*The Guaranty Survey*

or not to grant requested relief. How the Court wrestled with and disposed of these contentions discloses the nature of our problem. However, before we turn to these points, it should be noted that the Court found statutory support to compel arbitration as the *quid pro quo* for an agreement not to strike.

In place of the questions which the majority opinion in the *Lincoln Mills* case appears to have answered with finality, the opinion spawned a new set. *First,* to what aspects of contract enforcement is Section 301(a) applicable? *Second,* what is the substantive law to be applied in suits under Section 301(a)? *Third,* does the federal substantive law created by the judiciary under the directives of Section 301(a) form a body of law supplanting state law, or may the state courts continue to enforce state rights with reference to collective bargaining agreements affecting interstate commerce? *Fourth,* if federal law is deemed to be exclusive in the enforcement of arbitration provisions, may this exclusive federal right be enforced in the state courts or solely in the federal courts, and if initiated in the state courts, is the suit removable to the federal courts?

Merely to list the questions left unanswered by the Court is to illustrate the penumbral area which covers the variety of likely federal-state conflicts. How serious they are is comprehensively discussed in the 34-page Report of the Committee on Labor Arbitration to the American Bar Association meeting in July, 1957. What gives this report such pressing cogency is the fact that it was prepared by, and particularly directed to, labor law practitioners who must wend their way through this coral-tipped shore before they can land in any court. What the *Lincoln Mills* case means to the lawyers is neatly summed up on page 17 of the report.

"It may well have been desirable if the majority had been less elliptical and had elucidated at greater length on the source of substantive law . . . and had thrown out enough 'shafts of light' to permit rational projections of a line between federal and state authority in the matter of enforcement of collective bargaining agreements."

Other problems raised by the *Lincoln Mills* case, not treated in this paper, illustrate what judicial intervention means to voluntary labor relations. There may be more than a mere trace of prophecy and realism in Justice Frankfurter's dissenting comment that "judicial intervention is ill-suited to the special characteristics of the arbitration process," or in the late Professor Harry Shulman's pessimism about judicial intervention since "the courts . . . cannot restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government." He asked: "Might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award?" [17]

The overwhelming weight of opinion suggests that Section 301(a) offers an inadequate and unsuitable device for achieving voluntary compliance with the terms of a labor agreement. Apart from its divisive and nonfacilitative approach, Section 301(a) heightens rather than lessens federal-state antagonisms. Since the *Lincoln Mills* case issued on June 3, 1957, state courts have been called upon to determine whether they had jurisdiction in an arbitration controversy involving an interstate employer. In the *Coleman* case [18] the Kansas Supreme Court concluded that state courts had consistently exercised concurrent jurisdiction with federal courts in the enforcement of labor agreements. Therefore, jurisdiction was properly asserted by a state court over a challenge to an arbitration award, even though the employer's business admittedly affected interstate commerce. On the merits, the court concluded that the union was right. In the *Carpenters* case [19] the Supreme Court of California had to decide whether Section 301(a) makes the federal courts the exclusive tribunal for breach-of-contract actions affecting interstate commerce. It answered this question in the negative on the basis of the following propositions: (1) State and federal courts have concurrent jurisdiction over breach-of-contract actions involving interstate commerce. (2) In

[17] Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harvard Law Review* 999 (1955), at p. 1024.

[18] *Coleman Company v. UAW-AFL-CIO et al.*, 33 LABOR CASES ¶ 71,137 (November 9, 1957).

[19] *Los Angeles District Council of Carpenters v. McCaroll*, 33 LABOR CASES ¶ 70,959, cert. den., 355 U. S. 932 (January 27, 1958).

exercising this jurisdiction, the state courts are no longer free to apply state law, but must apply the federal substantive law governing collective bargaining agreements. (3) The precise nature of this federal substantive law is not known at present, since the federal courts are still in the process of elaborating it. Pending clarification by the federal courts, the California courts should assume that the federal law does not differ substantially from the state's own law of collective bargaining contracts. (4) Even though the state courts are bound to apply the now-emerging federal substantive law, they are not restricted to the remedies available in a federal court. They may apply their own remedies where they offer more complete and effective relief. Having laid this groundwork, the California Supreme Court ruled that the state court had jurisdiction to enjoin a breach-of-contract strike, even though the federal courts may be precluded by the Norris-LaGuardia Act from issuing an injunction in a similar situation. State courts, enforcing the federal rights created by Section 301(a), are not restricted by the anti-injunction clauses of the act.

The *Coleman* and *Carpenters* cases conveniently[20] epitomize the unsettling effects flowing from the unsettled nature of federal-state courts' disposition of issues involving enforcement of labor agreements. Yet such consequences appear inevitable from the *Lincoln Mills* decision, as Professor Charles Bunn observes:[21]

"The jurisdiction of state courts continues as it was. Congress has not said that federal jurisdiction is exclusive, and unless it say so, state courts in private litigation may (and indeed must within their jurisdiction) enforce the federal rights created by the act. But except as Congress delegates, or gives consent, or leaves certain matters open to state judgment, the law that all courts will apply is federal law. . . . What the effect will be on the ongoing process of negotiation, litigation, and decision, and especially on the responsibilities of state administrative agencies, remain questions for the future."

During the last 25 years, the income of the wealthiest 5 per cent of the population has increased less than the average income.—From *The Economy of the American People* (National Planning Association).

Since the *Garner* case,[22] the Supreme Court is acutely aware of federal-state problems growing out of the enactment of the Taft-Hartley Act. It has decided no less than 16 cases dealing with this issue. In labor-management controversies it is now commonplace for litigants to argue in federal-state terms. As a matter of fact, Justice Frankfurter in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 27 LABOR CASES ¶ 69,063, 348 U. S. 437 (1955), expressly adverted to the federal-state questions which will arise from the application of a body of federal common law to questions of enforceability under Section 301(a). So, too, in the *Lincoln Mills* case he points out the "prickly and extensive problems that the supposed grant would create:

"They present hazardous opportunities for friction in the regulation of contracts between employers and unions. They involve the division of powers between state and nation, between state courts and federal courts, including the effective functioning of this court."

The wisdom of Justice Frankfurter's concern was revealed in a 1956 case (*Bernhardt v. Polygraphic Company of America*, 29 LABOR CASES ¶ 69,689, 350 U. S. 198) where the Court had to determine whether a suit to compel arbitration would be governed by the law of New York or Vermont.[23] Shades of *Erie Railroad v. Tompkins!*

Before we turn to consider alternatives for handling enforceability of labor agreements under Section 301(a), it is necessary to formulate some fundamental concepts

[20] *Anchor Motor Freight v. Local 445, International Brotherhood of Teamsters*, 34 LABOR CASES ¶ 71,361 (1958), and *Hughes Markets v. Retail Clerks Union, Local 770*, 34 LABOR CASES ¶ 71,311 (1958), hold that state courts may enjoin unions from breaching a no-strike clause notwithstanding available arbitration and the fact that the employers are engaged in interstate commerce.

[21] Charles Bunn, "Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements," 43 *Virginia Law Review* 1247, 1259 (1957).

[22] *Garner v. Teamsters Union, Local 776*, 24 LABOR CASES ¶ 68,020, 346 U. S. 485 (1953). The union attorney, who litigated this case from the lowest state court through the Supreme Court, observed: "The full panoplied entrance of the federal government into the field of labor relations . . . opened a Pandora's box of jurisdictional complexities that bid well to occupy the resources of both federal and state courts for some considerable time." (Handler, 26 *Temple Law Quarterly* 111 (Fall, 1952).)

[23] Mendelsohn, "Enforceability of Arbitration Agreements Under Taft-Hartley Section 301," 66 *Yale Law Review* 167 (1956).

about the nature of arbitration. Experience with judicial implementation of Section 301(a) and state common law underscores the following view of Professor Taylor:

"The notion that alleged violations of the labor contract terms can soundly be made the subject of court action is based upon an erroneous concept of collective bargaining relationships." [24]

It appears to me that because neither Congress nor the state courts perceive or understand the function of arbitration, we are confronted not only with complex labor issues but also with strained federal-state relations.

Nature of Arbitration

What is the arbitral process? [25] Arbitration is a continuation and extension of collective bargaining. It is agreement-making as well as agreement-administration. Many provisions of labor agreements, including grievance-arbitration and no-strike clauses, are neither explicit grounds nor definitive answers for the grievances arising under them. Why are such provisions written into labor contracts? Under pressure of an imminent strike, obscure, ambiguous and sometimes even contradictory clauses are agreed to as the best obtainable under the circumstances. This represents an imperfect "meeting of minds" which subsequent arbitration is intended to clarify, but the "mutually acceptable" contract is preferable to a test of economic strength. General language is incorporated into the contract with the anticipation that many loose ends will be ironed out later in order to effectuate the agreement. Indeed, even the arbitration clause itself may be vague and general, and an imperfect instrument for dealing with later grievances. Neither can the bargainers possibly anticipate the kinds of problems which may arise under each clause during the life of the agreement. "To be adequate," Professor Taylor observed, "basic theories of collective bargaining and arbitration have to take these unspelled-out provisions into account." [26]

In the past, many strikes occurred during the life of a contract over differences about how incomplete clauses should be applied. Experience indicated that the agreement was not self-effectuating. Since there was no restriction on strikes during the life of an agreement, economic power could be and was applied to (1) fill out the unspelled-out clauses, (2) change stated terms and even (3) change the subject matter incorporated in the agreement. Such free access to strikes was not conducive to stable industrial relations. It was recognized that strikes are limited- or special-purpose tools. To utilize this sanction every time a grievance arose was costly to employers and employees. This method, moreover, was quite incompatible with ideas about economic security, employment stabilization and economic progress. A term agreement was achieved when the strike was restricted and arbitration accepted as a substitute.

More than two fifths of the people working for state and local governments work for the States of New York, California, Illinois, Ohio, Pennsylvania, Texas and Michigan.

—Department of Commerce

To add to the problem, labor agreements also contain "skeletal clauses" which designate a general principle without reference to the manner of application or effectuation. Collective bargaining which results in unspelled-out and skeletal clauses may be inconclusive, but would the parties or the public be better off if strikes were necessary to produce crystal-clear agreements? When there is no understanding or meeting of the minds with respect to the skeletal, incomplete, ambiguous, obscure and contradictory clauses, should the gaps be filled in by the parties themselves through voluntary arbitration, by administrative agencies or by the courts?

A word about the impact of the no-strike clause. It is merely a general promise by the union not to strike. However, what does this mean? The clause gains meaning and its proper role in the collective bargain-

[24] Taylor, *Effectuating the Labor Contract Through Arbitration*, reprinted in *The Profession of Labor Arbitration;* and *Effectuation of Arbitration by Collective Bargaining*, reprinted in *Critical Issues in Labor Arbitration* (BNA, 1957).

[25] Taylor, "The Unspelled-out Provisions of the Labor Agreement," 30 *Temple Law Quarterly* 20 (1956); Shulman, *The Role of Arbitration in the Collective Bargaining Process* (Reprint No. 15, 1949), Warren and Bernstein, *The Arbitration Process* (Reprint No. 15, 1953), and *A Profile of Labor Arbitration* (Reprint No. 18, 1953), Bernstein, *Arbitration* (Reprint No. 38, 1954), all published by the Institute of Industrial Relations of the University of California; Simkin, *Acceptability as a Factor in Arbitration Under an Existing Agreement* (University of Pennsylvania Press, 1952).

[26] Taylor, work cited at footnote 25, at p. 20.

The United States must be prepared for a long-term rise in defense demands. These demands must be determined upon their merits in terms of military and diplomatic strategy, rather than by their effects upon the economy or by the availability of governmental revenues to support them. —Joint Economic Committee

ing relationship when it is interpreted and applied by the parties themselves through arbitration. So-called quickie strikes by unions were undoubtedly responsible for the adoption of Section 301(a). It was believed that by making both parties legally responsible for their conduct under a labor contract, we could achieve maximum compliance with its terms. However, since the no-strike clause, as we have seen, affords no ready and exact answer, statutes intended to enforce it suffer the same disabilities as those designed to enforce other provisions of the agreement.

While the Supreme Court has construed Section 301(a) to compel arbitration under a labor agreement, it has not yet ruled directly upon the effect of this section when a union, which strikes in the face of a no-strike clause, defends in a Section 301(a) suit on the ground that the employer could have filed a grievance under the contract protesting the union's no-strike breach. The Court has denied certiorari in three cases; in two,[27] lower courts summarily dismissed the unions' defense grounded on arbitration, and in the third,[28] the lower court refused to allow an injunction because of the Norris-LaGuardia Act. While the Court will undoubtedly find it necessary to decide a case on this issue, the present situation reveals a dichotomy whereby all contract breaches, save those involving no-strike clauses, are apparently embraced within Section 301(a). Such an unsettled issue in a vital area is yet another example of the unsatisfactory nature of judicial intervention in voluntary collective bargaining.

How vexing and yet critical is the process by which we work out enforcement of agreements is indicated by Professor Nathan P. Feinsinger:[29]

" . . . if . . . Congress intended the federal courts to develop a body of substantive federal law to enforce collective bargaining agreements, including not only the no-strike clause but any other obligation contained therein, then labor and management (as well as students and practitioners of labor relations and labor law) have a deep interest, if not concern."

We must focus attention upon the direction which must be taken to limit or avoid judicial intervention and to minimize federal-state antagonisms. In the light of approximately 100,000 labor contracts, about 90 per cent of which contain some voluntary method for settling contractual disputes, there is a pressing need for evolving a procedure for dealing with this question. Whatever steps we take, it seems to me, should be measured against three basic values: (1) Voluntary arbitration is agreement-making as well as agreement administration, and is a substitute for the strike. (2) Judicial and administrative intervention, at most, should be facilitative and not determinative or dispositive. (3) Cooperative, instead of antagonistic or conflicting, federal-state relations should be attainable. Before considering one proposed solution for this problem, let me briefly examine some alternatives in the light of the above criteria.

Alternative Solutions

Within the past half-dozen years a substantial number of articles—of which but a few are noted herein—have dealt with a variety of suggestions for handling problems raised when an employer or union will not arbitrate or accept an award. The sustained interest in this issue cannot be measured or understood by the limited number of cases reaching the courts. According to a rough tabulation which I completed in June, 1957, there were about 75 federal court decisions under Section 301(a) in the past ten years. A survey[30] based upon questionnaires sent to 200 experienced labor arbitrators throughout the United States revealed that out of 47,092 cases heard by the arbitrators replying, during the ten-year period

[27] *Kokomo Paper Handlers' Union No. 34 v. Cuneo Press*, cert. den., 352 U. S. 912 (1956), leaving in effect, 29 LABOR CASES ¶ 69,802, 230 F. (2d) 108 (CA-7, 1956); *W. L. Mead, Inc. v. Teamsters, Local 25*, cert. den., 352 U. S. 802, leaving in effect, 29 LABOR CASES ¶ 69,802, 230 F. (2d) 576 (CA-1, 1956).

[28] *A. H. Bull Steamship Company v. Seafarers' Union*, 33 LABOR CASES ¶ 71,095, 250 F. (2d) 326 (CA-2, 1957), cert. den., 355 U. S. 932 (January 27, 1958).

[29] Feinsinger, "Enforcement of Labor Agreements—A New Era in Collective Bargaining," 43 *Virginia Law Review* 1261, 1265-1266 (1957).

[30] Howard, "There Ought to Be a Law—Or Ought There?" 1 *Missouri Law Review* 1 (1956).

In a free society it must be recognized that disputes will be settled within the framework of our judicial system.

—William P. Rogers

(1946 to 1956) a party declined to follow an award in only 81 cases, and only 51 cases reached the courts. Dr. George W. Taylor, in testimony before the Pennsylvania Governor's Commission, declared that "of all the decisions I have ever issued [as a labor arbitrator] none of them went to the court, and they are in the thousands." He stated further that he "only had one decision where either party refused to follow it." [21] Dr. Robert P. Brecht, an experienced arbitrator, testified before the same commission that out of more than 900 cases that he had decided, only one went to the court.[22] Specific studies reveal the really phenomenal record of voluntary compliance with arbitration awards.[23]

There are no simple answers to the question of why there is such apprehension about and interest in compliance with arbitration. Its importance is underscored by Professor Feinsinger who observes that:[24]

"The crystallization of . . . views into a uniform legal doctrine may have a far greater impact on the institution of collective bargaining than the considerable impact of the views of the federal courts on the initial stages of the bargaining process."

While the empirical data is admittedly limited, it appears safe to generalize that only a few cases reach the courts. However, the paucity of such cases does not indicate the significance of the problem. Even a limited increase, as admittedly there is, has portents. The vast increase in labor agreements providing for arbitration coupled with the increasing quasi-public role of unions stimulate efforts to make unions legally accountable. Passage of the Taft-Hartley Act provided administrative and judicial channels for compelling contract compliance. A not insignificant factor is the role played by lawyers in labor relations. Confronted with situations which seem to them analogous to commercial contracts, lawyers readily fulfill the dictates of their training by going to the courts.

Also concerned with enforcement of arbitration, state labor commissioners and state bar associations have approved legislation applicable to both commercial and labor-management arbitration in the form of a Uniform Arbitration Act. (Note that this is a "uniform," not "model state" act.) This proposed statute was approved by the American Bar Association at its 1955 meeting. While it has been submitted to a number of state legislatures, in so far as I know it has not been adopted by any of them. Most revealing is the fact that at its annual meeting on January 18, 1957, the National Academy of Arbitrators refused to recommend its approval.

The Uniform Arbitration Act is based on the assumption that by substituting a uniform law in all the states in place of the variety of statutory and common law procedures now prevailing, enforcing labor agreements would become simpler. The proponents of this act believe that the availability of an uncomplicated, clearly defined and limited arbitration statute would aid employers and unions, should they find it necessary to resort to court action for contract breaches. However, one writer believes that the paucity of common-law or statutory litigation is not due to procedural difficulties but rather to the "general acceptance of the principle of voluntary arbitration and the obviously disruptive influence of lawsuits in situations where the parties must continue to live and work together." [25] Professor Gregory expressed a similar view when he observed: "Courts do not provide either an adequate or appropriate method of applying and enforcing collective agreements." [26] The late M. Herbert Syme, an experienced lawyer who represented unions in many arbitration cases and was chairman of the Pennsylvania Governor's Commission on Labor Legislation, strongly opposed the Uniform Arbitration Act and favored, at best, "a voluntary arbitration statute . . . drawn with a great deal of care. The arbitral process must remain inviolate . . . [it] should implement what the parties do; it should never supplant their actions or their desires." [27]

[21] Proceedings, February 23, 1953, at p. 53.
[22] Proceedings, March 6, 1953, at p. 57.
[23] Dowell, "Judicial Enforcement of Arbitration Awards in Labor Disputes," 3 *Rutgers Law Review* 65 (1949).
[24] Work cited at footnote 29, at p. 1266.
[25] See Katz, work cited at footnote 14, at p. 764.
[26] Gregory, *Labor and the Law* (New York City, W. W. Norton and Company, 1946), p. 401.
[27] Syme, "Voluntary Labor Arbitration Is Threatened!" 7 *Labor Law Journal* 142, 145 (March, 1956).

The Uniform Arbitration Act assumes that both federal and state governments have concurrent jurisdiction, and that Section 301(a) did not oust the states from affording relief. I do not share this assumption, nor has the Supreme Court expressly passed on this question. If anything, state jurisdiction was diminished if not eliminated when the Court held that Section 301(a) created an enforceable right in the federal courts. Consequently, if the Uniform Arbitration Act were adopted, it could intensify, rather than moderate, the federal-state antinomy in this area. However, a more serious criticism of the act is the increased potential for court intervention. Professor Howard (work cited at footnote 30) explicates the many serious objections to the act, and the professional standing of those who oppose it is revelatory of its weaknesses. Because the act hinders voluntary arbitration and because it cannot solve adequately the federal-state differences, the act should be rejected as a solution to the problem of enforcing labor agreements.

Another solution, expressed infrequently in public but mentioned in private discussions, is to leave the situation as it is. This means that Section 301(a) and the variety of state statutory provisions and common-law actions would exist without change. At first blush this solution appears intolerable in view of the vigorous criticisms leveled at what we now have. However, more reflective consideration suggests that before we change, we should carefully weigh the values of change. Perhaps we need a period of time in which to crystallize our experiences and thinking before embarking on a new road. Although my own inclination, as indicated later, is to propose another procedure for the disposition of this problem, I would vote for "leave alone" as a second choice. Some have said that the very complexities and difficulties which we now encounter will encourage unions and employers to work out their own differences without resort to the courts, and the limited number of court cases lends some support to this view.[28] If we leave the present situation untouched, states can experiment with various solutions—an aspect of our federal system which has been endorsed repeatedly by the Supreme Court.

We lawyers, planning for the future . . . must get rid of conformity and cultivate once again the traits of individuality. We must find a place of honor for the dissenter, the unorthodox. We must once more find our salvation in the free interplay of ideas.

—Justice William O. Douglas

Whatever the nature of the problem, some will always propose legislation as the most feasible answer. It has been recommended that either Congress or the Supreme Court, preferably the former, enunciate the view that Section 301(a) embraces the full sweep of Congressional commerce power, leaving the states to handle only intrastate employers. Since we know that this would exclude the states from any jurisdiction because plenary commerce power can reach virtually every business, the proposal really intends that enforceability should be handled solely under federal law. Putting to one side the highly doubtful political question of whether Congress would take such a step, this solution suffers the same impairments as the Uniform Arbitration Act, except that it might insure national uniformity. It would introduce federal courts, presently lacking substantive law, into the realm of voluntary arbitration.[29] Merely to examine the nature of the issues confronting the Supreme Court in the *Westinghouse* and *Lincoln Mills* cases suggests the gamut of the problems. Yet serious students believe that it is too late to question federal judicial intervention. The Report of the American Bar Association Committee on Labor Arbitration ends on this note:

"In the last analysis the entire argument concerning the undesirability of judicial intervention is beside the point. Irrespective of whether judicial intervention is deemed wise or unwise, on passage of the Taft-

[28] We have no data as to *why* the parties sought court action. A stark item hit me in my prior research when I noted that the Textile Workers Union was involved in more court litigation than any other union. May it be hypothecated that because this union has diminishing economic power in a declining industry, it is compelled to resort to the courts? Empirical studies along this line are essential before we can discuss intelligently any worthwhile changes.

[29] This can be illustrated in a December 16, 1957 decision. Called upon to decide whether a resisting employer could be compelled to grant specific performance to an arbitration clause, the United States Court of Appeals for the First Circuit held that the contractual difference was not arbitrable and, therefore, dismissed the Section 301(a) suit. (*Local No. 149 of American Federation of Technical Engineers v. General Electric Company*, 33 LABOR CASES ¶ 71,149, 250 F. (2d) 922 (CA-1, 1957).)

Hartley Act it was statutorily decreed on a federal basis. The Supreme Court opinion [*Lincoln Mills*] is, in a sense, merely a rationalization of the artlessly drawn legislative command that the collective agreement, representing the end product of the initial stage of the collective bargaining process and the basic guide to another—the grievance procedure and arbitration—were to be brought under federal court supervision and control. The Supreme Court majority, recognizing Congressional desire and intention that collective bargaining contracts were to be 'equally binding and enforceable on both parties' made them so."

Another writer, whose article was quoted in the *Lincoln Mills* case, ends his paper with five conclusions, the last one stating: [40]

"For the purpose of effectuating national policy and to accomplish uniformity in the area of labor management relations, the federal courts should be the exclusive tribunals for all litigation involving breaches of collective bargaining contracts. Only in this way can an effective system be established to provide available relief that will be adequate, uniform and not dependent upon a calculated choice of forums."

In my judgment, granting paramount authority to the federal courts fails to meet any of the standards previously postulated. Such a channel would enervate voluntary arbitration by affording a judicial forum whenever a party wished to avoid arbitration which it had voluntarily accepted. Indeed, should the availability of a federal forum incline more parties to resist arbitration, then it is too much to expect workers to await the slow, cumbersome and unsatisfactory judicial procedures for reconciliation of contractual differences. Would unions agree to no-strike and arbitration clauses

State and local governments in the United States employ approximately 5.6 million persons.

—Department of Commerce

if they knew that their employer could nullify arbitration by seeking judicial adjudication? Prescinding the view of arbitration expressed in this paper, all-inclusive federal power over enforceability would denigrate, not encourage or enhance, federal-state mutuality. It seems too much to expect state courts and officials to stand by idly while a contractual controversy, with which they are intimately concerned, drags through the federal courts. One local illustration highlights this point. When longshoremen in the Philadelphia port struck in 1955 on the ground that their employers had violated the contract, the common pleas court promptly issued an injunction, finding unpersuasive the argument that the subject matter of the complaint was cognizable only under Section 301(a). The judge would not permit the port to be immobilized while the noninjunctive, suability provisions of this section were exhausted. Whatever the source of state power—police or otherwise—it is unlikely that any state would refrain from acting under such an emergency. This decision was sustained upon appeal to the Pennsylvania Supreme Court and certiorari was denied by the Supreme Court.[41] On all counts, therefore, amending or clarifying Section 301(a) seems to be an unsatisfactory answer.

Another approach to meeting the problems created by Section 301(a), as interpreted in the *Lincoln Mills* case, was the introduction of H. R. 10308 [42] on January

[40] Mendelsohn, work cited at footnote 23, at p. 202.

[41] *Philadelphia Marine Trade Association v. Longshoremen, Local 1291*, 28 LABOR CASES ¶ 69,326, 382 Pa. 326 (1955), cert. den., 350 U. S. 843 (1955).

[42] "A Bill to extend the provisions of law relating to arbitration of contracts to labor contracts and to permit enforcement of such contracts in State courts.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the center heading of section 1 of title 9 of the United States Code, entitled 'Arbitration' is amended to read as follows:

" 'Maritime Transactions', 'Commerce', and 'Industry Affecting Commerce' defined; Exceptions to Operation of Title'

"(b) Section 1 of such title is amended by inserting after 'Territory or foreign nation' the following: '; "industry affecting commerce," as herein defined, means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.'.

"(c) Section 1 of such title is further amended by striking out the comma after 'seamen' and inserting 'or' in lieu thereof, and by striking out 'or any other class of workers'.

"Sec. 2. Section 2 of title 9 of the United States Code is amended to read as follows:

" '§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate; jurisdiction of State courts

" 'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce, or a contract between an employer and a labor organization representing employees in an industry affecting commerce, to settle by arbitration a controversy thereafter arising out of such contract or transaction, or

(Continued on following page)

28, 1958, by Congressman Ludwig Teller. Because of his recognized standing in the field of labor relations, achieved as a teacher, writer and arbitrator, Congressman Teller's statutory proposal deserves thoughtful consideration. His solution is to amend the United States Arbitration Act in order to provide for the enforcement of labor agreements. (It should be noted that while this act was considered by many lower courts faced with Section 301(a) suits before the *Lincoln Mills* case, the Supreme Court ignored the United States Arbitration Act.)

H. R. 10308 would amend the United States Arbitration Act in order to make it expressly applicable to all industries affecting commerce. It is anticipated that given this broader definition, the federal courts would find statutory support for the enforcement of arbitration provisions. At present the federal courts disagree as to whether "involving commerce" found in the act is intended to reach the full sweep of Congressional plenary power over commerce. In addition to enlarging the scope of its coverage, the amendatory proposals seek to resolve the federal-state conflict.

With respect to this issue, the bill proposes to safeguard the jurisdiction of state courts in those states where, by statute, arbitration of disputes may be specifically enforced. Congressman Teller sees two undesirable characteristics in federal pre-emption, a view concededly implicit in the *Lincoln Mills* case. "In the *first* place," he notes, "federal preemption might unfairly deprive a union of remedies where it seeks to enforce rights due employees whom it represents."[43] This conclusion is drawn from the *Westinghouse* decision. Second, "Federal preemption in the field of arbitration is unfair to those States which have pioneered in making labor arbitration effective and which now provide for specific enforcement of agreements to arbitrate union-management grievance disputes." According to his court, 11 or 12 states now provide for specific enforcement. He hopes that as a by-product of H. R. 10308, the remaining states would be encouraged to adopt similar statutes enforcing arbitration, particularly if they wish to avoid further federal intervention.

Since by far the largest share of the total national income accrues to people with the lower and middle incomes, it follows that the huge governmental expenditure programs cannot possibly be financed by taxes imposed only on the wealthiest.—*The Economy of the American People* (National Planning Association).

Congressman Teller moves from the federal-state problem to the knotty question of what substantive law is to be applied under his amendments to the United States Arbitration Act. Whether the proceedings arise in a federal or state court, H. R. 10308 "contemplates, in line with the decision in the *Lincoln Mills* case, that Federal substantive law should apply . . . ." Although the Supreme Court did not explicitly indicate the sources of federal substantive law, he believes that the Court's aim was to "use the policies of the Taft-Hartley Act in general, section 301 in particular, and any other Federal statute, as guides for building the Federal substantive law." In addition to these "sources," the Court also said: "But State law, if compatible with the purpose of section 301, may be resorted to in order to find the rule that will best effectuate the Federal policy." Granting concurrent jurisdiction to federal and state courts in the interpretation or enforcement of federal law is, according to Congressman Teller, "nothing new." His report to the House of Representatives on H. R. 10308 ends with the observation that the proposed amendments to the United States Arbitration Act do not embrace issues arising under wage reopening clauses or arbitration of new contract terms, because these questions occur rarely.

Limited judicial intervention to obtain arbitration of contractual disputes under an amended United States Arbitration Act is the first legislative effort to deal comprehensively with the problems raised by

(Footnote 42 continued)
the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforcible, save upon such grounds as exist at law or in equity for the revocation of any contract. A suit or proceeding may be brought in a State court having jurisdiction of the parties, in relation to an agreement for arbitration of a controversy which may arise under a contract between an employer and a labor organization representing employees in an industry affecting commerce, in any State which by statute provides for the specific enforcement of such agreement.' "

[43] Speech of Congressman Ludwig Teller of New York in the House of Representatives, Tuesday, January 28, 1958.

Section 301(a) as interpreted in the *Lincoln Mills* case. The principal value of the amendments is to return contractual disputes to the parties' voluntary machinery for resolution. In addition, H. R. 10308 provides for staying court action brought in disregard of agreements to arbitrate, for appointing an arbitrator where the parties have failed to name one or where the parties have no method for appointing one, and for compelling attendance of witnesses at arbitration hearings. However, does it attenuate arbitration by involving the federal and state judiciary, and intensify or minimize federal-state conflicts?

In my judgment, even limited federal or state court intrusion harms the arbitration process. Where one party to the contract refuses to arbitrate, except in situations involving alleged breaches of the no-strike and lockout provisions, the other party would resort to the federal or state courts under H. R. 10308 for an order requiring arbitration. The defending party would contend that its refusal to arbitrate was based upon its interpretation of the arbitration provisions which did not embrace the matter in dispute. Immediately the court would have to determine whether the contractual dispute was arbitrable. If it were not, then the agreement to arbitrate would not be enforced. This critical question is further complicated because under H. R. 10308, agreements to arbitrate are enforceable "save upon such grounds as exist at law in equity for the revocation of any contract."

Undoubtedly, the unwilling party would seek to show that the conduct of the other party or the terms of the agreement, or some federal or state law covering labor relations or reference to commercial contracts foreclosed enforcement of the agreement to arbitrate. Called upon to decide whether the dispute was arbitrable, the court would have little guidance, for it is quite clear that available substantive law is a poor source for resolving questions of arbitrability. Moreover, there are now sufficient court decisions, federal and particularly in the New York courts, to indicate that courts are likely to place collective bargaining agreements in a legal strait jacket instead of viewing arbitration as a problem-solving process. To invoke the sanction of the courts means that the judiciary, not the parties' voluntary machinery, will interpret labor agreements. Is this desirable and administratively feasible?

More than a billion dollars in unemployment insurance benefits was channeled into community and national purchasing power during the first quarter of this year.

—James P. Mitchell

Would the proposed alteration of the United States Arbitration Act meet the critical issue of strikes during the term of a contract containing no-strike and arbitration provisions? At present, most courts follow the view that if the union strikes and the employer sues for breach of contract, the union cannot procure a stay of the suit because of available arbitration, since the union rendered the contract invalid by striking instead of pursuing arbitration. As I interpret the proposed amendments, they do not meet this troublesome problem. Consequently, unions would still be subjected to Section 301 suits for striking during the term of a fixed contract containing no-strike and arbitration provisions. If, as previously indicated, implementation of the no-strike clause occurs only when it is interpreted and administered by an arbitrator who can determine remedies appropriate to each situation,[44] then court resolution of strike situations offers little aid to the parties in working out their joint relationship.

Would federal or state courts be able under H. R. 10308 to determine questions of arbitrability and to dispose of breaches of the no-strike clause in the face of the paucity and general unreliability of existing substantive law governing these questions? Neither Section 301 nor the Taft-Hartley Act, nor any other federal or state statute, appear to contain any meaningful content for the resolution of contractual disputes. Suppose the union protests the employer's transfer of certain employees into the bargaining unit, thus displacing union members, and the employer contends under a "management rights" clause that the issue is not arbitrable. When this issue reaches the court, to what sources should it turn for an answer? Isn't it likely that an arbitrator, not the court, is in the best position to

[44] "In each soundly conceived collective-bargaining relationship, the grievance machinery is usually adapted to the unique conditions present in the situation for which it is designed." Jensen, "Dispute Settlement in the New York Longshore Industry," 10 *Industrial Labor Relations Review* 588 (July, 1957).

A century ago a man worked 70 hours a week and had an average life expectancy of 40 years. The figures today are exactly reversed. Today a man works a 40-hour week and has a 70-year life expectancy.

resolve this difference? Even if the court could find appropriate substantive law,[45] the issue is one between the parties and it is rare that general legal rules can be applied adequately to deal with a specific issue of this kind.

Measured from the view of arbitrability and substantive law, H. R. 10308 is open to serious challenge. Although it is aimed to limit judicial intervention, H. R. 10308 must inevitably involve the courts and this legal channeling of contractual disputes appears undesirable. However, does it facilitate resolution of federal-state conflicts in handling enforcement of arbitration?

It is asserted that H. R. 10308 successfully copes with the federal-state problem by allowing courts, in the states which have statutes enforcing arbitration, to provide sanctions when a party refuses to arbitrate. Again, this means state court intervention, an approach which seems to me to vitiate the values of voluntary arbitration. However, an additional difficulty arises in respect to the determination of whether the employer is engaged in interstate or intrastate commerce. If the NLRB's commerce criteria are decisive, does this mean that either the state or the federal courts will interpret the appropriate standards? In view of the complex problems encountered by the NLRB with respect to its own commerce standards, and the changes in these standards, would the courts have reasonable and consistent criteria for determining jurisdiction? It is clear that allowing federal courts on the one hand and state courts on the other to assert jurisdiction predicated on NLRB standards is fraught with serious —and possibly time-consuming—difficulties. Congressman Teller's effort to meet the federal-state problem is welcome because it is consistent with our federalism and parallels the suggestion discussed below. However, H. R. 10308 does not establish with sufficient preciseness and clarity the areas reserved for each.

Considerable attention has been devoted to the proposed amendments because they represent the first comprehensive effort on the legislative front since Section 301 was enacted as part of the Taft-Hartley Act. Principally because it introduces court resolution of enforcement of arbitration, but also because it relies on virtually nonexistent substantive law and removes responsibility for settling contractual disputes from the parties where it properly belongs, the proposal in my judgment does not contribute to enhancing the arbitration process. Yet H. R. 10308 develops an approach which deserves thoughtful consideration. Perhaps as we appraise the various alternatives, we may develop one which meets the needs of our evolving collective bargaining process.

So far we have considered four alternatives to the problem of enforcing labor agreements: (1) the Uniform Arbitration Act, (2) no alteration of the present situation, (3) making federal power supreme and (4) amending the United States Arbitration Act. None of these responses to the problem meets the standards deemed essential, particularly as respects federal-state antinomy.[46] Professor Gregory was alert to this problem when he observed:[47]

"Actual employer-union relationships in collective agreements are being created too rapidly for our existing legal machinery to accommodate. . . . Everyone directly interested . . . must face the fact that collective bargaining and collective agreements are here to stay . . . to avoid industrial chaos, a practical and effective procedure must be devised to make collective agreements stable and operative . . . now is the time for everyone interested to speculate on these matters, for the mold of our future law of labor relations is about to be cast."

This brings me to a proposed administrative procedure for handling unwillingness to accept voluntarily created arbitration.

NLRB Disposition

Until quite recently the NLRB consistently held that a refusal to arbitrate a con-

[45] It is noteworthy that when the Supreme Court in the *Lincoln Mills* case considered the sources of substantive law, it did *not* mention arbitration decisions.

[46] A comprehensive and detailed consideration of the federal-state problem is found in Forkosch, "Jurisdiction and Its Impact on State Powers," 16 *Ohio State Law Journal* 301-402 (Summer, 1955). For a somewhat restrained but highly effective treatment of court involvement in arbitration cases, see Friedin, *Labor Arbitration and the Courts* (University of Pennsylvania Press, 1952).

[47] Gregory, work cited at footnote 36, at p. 412.

The only way to increase the skilled labor supply, in a word, is training.
—James T. O'Connell

tractual difference or accept an award was *not* an unfair labor practice.[48] A proposal to achieve this end was contained in the Senate bill prior to the adoption of the LMRA but was deleted in conference with the following observation:[49]

"Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

However, in *Westmoreland Coal Company*, 117 NLRB 1072 (1957), the NLRB decided that the union's strike against an arbitrator's award was an unlawful refusal to bargain and the union was ordered to accept the award. Similarly, the Board held in *Boone County Coal Company*, 117 NLRB 1095 (1957), that the union unlawfully refused to bargain when it struck over a contractual dispute cognizable by the grievance-arbitration machinery. In these decisions, which accept the concept that arbitration is an extension of collective bargaining, the Board indicates that it will require employers and unions to utilize the voluntary machinery which they have created.[50]

This administrative remedy removes the courts from intervening in the enforcement of labor agreements. Only if the respondent refuses to comply would the NLRB order reach the United State Court of Appeals, the judicial forum entrusted to enforce Board orders. Simplicity and predictability characterize this remedy. An experienced agency which handles all phases of labor-management relations is always available—and without cost to the parties. Neither questions of arbitrability nor merits, which generally create serious problems for the courts, would require NLRB treatment. So long as the contract provided for arbitration, whether limited or unlimited, the Board would require the parties to use it. This would apply even where the union struck in the face of a no-strike pledge. An arbitrator, not a court, is in the best position to administer and enforce an undertaking of this type, including monetary or disciplinary penalties upon the union.[51] Once employers and unions are aware of the likely disposition should they refuse to arbitrate, only a few cases should reach the NLRB.

Congress has charged the Board with public responsibility for assisting and facilitating collective bargaining and insuring that contractual obligations are bilaterally enforceable. To require parties to live up to voluntary agreements to arbitrate or to comply with awards is not derogative of the parties' private grievance procedure; on the contrary, it encourages resort to such procedure. The bargaining obligation would rest equally on both parties. The sanctions of neither the Board nor the courts could be invoked successfully to aid one party over the other. The administrative agency, and occasionally the courts, would merely play the role of returning contractual differences to the parties, thereby assisting the positive development of collective bargaining—an objective which it is designed to achieve.

However, what about Section 301(a)? Should the NLRB require arbitration? One answer would have Congress eliminate this section but this appears politically unlikely. This section would be in addition to, not in lieu of, an NLRB remedy. Experience with Section 303, which permits employers to sue unions where unlawful strikes have occurred and which is in addition to the administrative remedies under Section 8(b)(4), suggests that employers avail themselves infrequently of the suability section once they are granted an administrative remedy. Moreover, there are substantial differences between a public agency seeking relief from a court and a private party seeking such relief; in the former case it is assumed that public need demands action. Development of the administrative remedy for honoring arbitration would undoubtedly limit the impact and use of Section 301(a).

Does the proposed NLRB solution, involving national administrative regionalism, suggest a satisfactory adjustment within the framework of our federalism? I believe that it does, because federal-state administrative cooperation can be evolved.

Wisconsin, a pioneer in all types of labor legislation, has successfully administered a provision of the Wisconsin Employment

[48] *United Telephone Company*, 112 NLRB 779 (1955); *Textron Puerto Rico*, 107 NLRB 583 (1953).

[49] H. Conf. Rept. 510 on H. R. 3020, pp. 545-546.

[50] *Morton Salt Company*, 5 CCH Labor Law Reports (4th Ed.), ¶ 55,144, 119 NLRB. No. 175 (1958).

[51] Gregory, work cited at footnote 36, at p. 409.

Technology has been such a benevolent force in this country that I sometimes think that we are too much inclined to dwell on its good results and too little disposed to remind ourselves of its hazards.

—James T. O'Connell

Peace Act which makes unlawful a refusal to arbitrate or comply with an award. In so far as I know, there have been no federal-state conflicts even when this provision was enforced against interstate employers. While there have, as yet, been no reported cases in which Section 301(a) was raised in a Wisconsin proceeding, I would anticipate that a federal court would not sustain this argument because in the *Lincoln Mills* case the Supreme Court indicated that federal courts must look to state law for substantive disposition of Section 301(a) suits. In the absence of data, we can only speculate upon the results for federal-state comity should all states[52] adopt laws similar to Wisconsin's. However, if the states are genuinely interested in avoiding enlargement of national power over labor relations, they can establish procedures for dealing with this problem.

Today only 12 states, Hawaii and Puerto Rico, have comprehensive codes regulating labor relations. Although Taft-Hartley invited enactment of compatible state legislation, no state has passed such a law since 1947. Since there is such a variation in the level of industrialization among the 48 states, it is unlikely that each state will enact compatible laws to enforce contracts administratively. Consequently, agreements to arbitrate would be enforced by the NLRB or by state administrative agencies, where they existed. For these employers not covered by the NLRB for lack of jurisdiction, or by state agencies because not established, the parties could still resort to whatever common law rights the states provided.

There are two additional advantages supporting administrative handling. It would accomplish national uniformity in an area where Congress seeks nation-wide regulation. This uniformity would be achieved only on a procedural basis, thereby limiting governmental intrusion. A second advantage is that the states could serve as experimental laboratories. While basic state law would render unlawful a refusal to arbitrate or implement an award, the act could adopt such additions and variations as would be suitable to the needs of the respective states. Such a law could include or exclude groups of employees not covered by the national act, or could vary the scope of the bargaining units. Should two or more states be confronted with problems unique to them, bi-state legislation or compacts, with federal approval, could be adopted.[53]

I think that the NLRB handling of this problem adequately meets the three criteria noted before. It gives controlling weight to voluntary arbitration as an extension of collective bargaining. It minimizes, if not eliminates, court intervention, which is the most serious criticism leveled at the uniform act, Section 301(a) and the hodgepodge of common law remedies.[54] It allows and encourages federal-state cooperation to a degree not available in any other proposed solutions. Furthermore, implementation of the proposal requires modest administrative and legislative changes—a not inconsiderable factor.

Among the many thoughtful writers who have considered federal-state jurisdiction in labor matters, Professor Cox[55] has made many useful suggestions. I share his view that we should attempt to integrate quasi-judicial tribunals (arbitration) with the NLRB and courts in our search for an accommodation between the institutions of collective bargaining and the surrounding legal system.[56] Although I differ with his approach to the problem of enforcing labor agreements, Professor Cox's views are worthy of perusal.

He would exclude state regulation of labor relations of any business governed by the NLRA. This would be achieved by having Congress clearly delimit federal jurisdiction. In other words, he opposes

[52] Four states (Wisconsin, Kansas, Colorado and Minnesota), Hawaii and Puerto Rico make breach of contract by a union an unfair labor practice, and all of them but Kansas make an employer's breach a corresponding violation of law.

[53] Like the New York-New Jersey Bi-State Waterfront Compact regulating longshore labor relations.

[54] The pros and cons are comprehensively discussed in "The Proposed Uniform Arbitration Act: A Panel Discussion," printed in *Critical Issues in Labor Arbitration*, edited by Professor Jean T. McKelvey (BNA, 1957), Ch. VI.

[55] Cox, "Current Developments in Labor Law and Legislation," printed in *The Profession of Labor Arbitration*, edited by Professor Jean T. McKelvey (BNA, 1957), Ch. V.

[56] Cox, "Labor and the Future of Labor-Management Relations," 51 *Northwestern University Law Review* 240 (1956).

The creation of a comprehensive federal agency to deal with all phases of minority employment is an urgent necessity.—Charles Abrams, chairman of the New York State Commission Against Discrimination.

concurrent jurisdiction. Justifications for a national labor law are grouped under four headings: (1) Where businesses have great importance to the economy or national defense, their labor relations must be matters of national concern. (2) National labor legislation is also warranted in many instances by the need to prevent competition based upon differences in state law. (3) Often the balance of convenience, from the viewpoint of the people affected, lies on the side of national control. (4) National control may be warranted by the desirability of spreading the benefits of a sound labor policy.

Professor Cox lists justifications for a measure of state control under four headings: (1) Often the balance of convenience lies on the side of state regulation. (2) Often state governments are better equipped to reach wise decisions, especially in particular cases. (3) Leaving an area for state regulation encourages local experimentation. (4) Local authority means local responsibility, and local responsibility is closer to our ideal of self-determination.

Weighing both sets of considerations, Cox suggests three factors to assist in drawing a line between the businesses whose labor relations should be subject to national regulations and those left to the states. First, is the fact that federal legislation and regulation have been extended too far while too little has been left to the states. Second, rigid standards cannot be drawn based upon dollar-size or volume of goods, but empirical studies might disclose where a federal-state line might be drawn.[57] Third, the dividing line between state and federal regulation should be drawn with such clarity that both governments and the people affected know in advance whether state or federal law is controlling.

On the basis of his examination of the federal-state conflict, Professor Cox concludes that whenever a business is subject to the national act, the states should be prohibited from attempting to regulate its labor regulations. On the point of labor agreements, he observes:[58]

"The law governing the validity of collective bargaining agreements and the remedies for their enforcement is so intimately related to the processes of negotiation that it, too, should not be left to the States."

He does concede that states should be free to regulate the terms of collective bargaining agreements by applying laws of general applicability, such as antitrust laws, insurance regulations and sundry criminal statutes, "but not by singling out collective bargaining agreements for special legislation."

Although I respect the views expressed by Professor Cox, I am not convinced that complete federal pre-emption is the most desirable answer. In the quoted article he does not consider concurrent administrative disposition, although in two 1953 papers,[59] which he coauthored with Professor Dunlop, limited support was given to such a procedure. I fail to see how any line can be drawn between national and state coverage. Unlike Professor Cox, I believe that some area of state regulation will always remain. Better it would be, in my judgment, to evolve a solution which provides for complementary federal-state handling than to carve out respective sovereignties. Moreover, I believe that fewer administrative problems would ensue under my suggestion than the one proposed by Professor Cox. In any event his views, as well as those of others in this field, are deserving of careful examination and analysis.

Summary

One of today's most pressing questions in the regulation of industrial relations arises out of the necessity of fitting our rapidly growing labor laws into a federal system in which the sum of governmental power is shared between the states and the nation. No other problem gives rise to more litigation. Congress and state legislatures are also concerned with this problem. Since *NLRB v. Jones & Laughlin Steel Corporation*, 1 LABOR CASES ¶ 17,017, 301 U. S. 1 (1937), federal power over labor relations has so expanded that a strain has been placed upon our federal system. There is such uncer-

[57] One writer suggests using an "industry" test. (Turnbull, "Federal-State Jurisdictional Problems," 7 *Labor Law Journal* 5 (January, 1956).)

[58] Cox, work cited at footnote 55, at p. 118.

[59] Cox and Dunlop, "Regulation of Collective Bargaining by the NLRB," 63 *Harvard Law Review* 389 (1950), and "The Duty to Bargain Collectively During the Term of an Existing Contract," 63 *Harvard Law Review* 1097 (1950).

tainty in the field that few lawyers dare to tell their clients whether state or federal law determines the validity of a collective bargaining contract.

During the past ten years we have been wrestling with the enforcement of labor agreements. Voluntary arbitration has become the widely accepted process for administering contracts. When the process breaks down, everyone yearns for some handy method to make it work. Most attention has been focused on legislation as the answer, and Congress adopted this view in Section 301(a). Experience under it, as well as with common law suits in state courts, highlights the disadvantages of judicial intervention. Legal adjudication of rights and obligations under labor contracts creates more, rather than less, federal-state conflicts. Neither Section 301(a) nor a Uniform Arbitration Act offers a satisfactory approach.

To accomplish the three objectives of (1) utilizing arbitration in its proper role, (2) eliminating judicial intervention and (3) facilitating cooperative federalism, an administrative remedy is proposed. This suggestion appears to meet the necessary criteria and requires the least alteration of existing patterns of labor relations and federal-state relationships. Its aim is to resolve problems by means of accommodation and compromise within the framework of such interacting forces as unions, employers and governmental institutions. However, above these are public responsibilities which must be met.

Professor Sanford Cohen puts it in these terms:[60]

". . . labor law is not law that affects only laboring groups . . . our economy is . . . highly cooperative, if the law does not render justice, there will be manifestation of that injustice through a breakdown of that cooperation. It becomes highly important, then, to understand this new body of law, and to set up a criterion of judgment that rises above single group interests and enables an evaluation to be made on the basis of the greatest justice to the greatest number."

Collective bargaining is one of the basic elements of our democracy. Whenever labor-management relations falter under our federal-state system, we are confronted with a serious challenge. Our ingenuity and resourcefulness are taxed to find accommodations within the framework of our system. Over the years we have managed quite successfully to adapt our system to changing needs, but not without considerable strain. Today our system is being challenged on the world-wide scene by another one which scoffs at our idealistic efforts, based, as it is, on the notion that free men can find acceptable compromises for solutions to their problems without governmental imposition. Voluntarily accepted terms and conditions of employment contain an inner strength unmatched by any other system known to man. These are achieved only when we minimally regulate labor relations, restrain our use of political and economic power, and rationalize voluntary procedures.[61] Our efforts along this route are never ended. To the extent that we work out acceptable, though imperfect, compromises, we demonstrate the values of our system. It is hoped that the profferred suggestion contributes to the realization of this aim. **[The End]**

SIDEWALK INJURY COMPENSABLE

An employee was entitled to workmen's compensation for injuries sustained in a fall upon a public sidewalk while walking to a company-owned parking lot. This is the substance of the holding by the New York Supreme Court, Appellate Division, in *Gaik v. National Aniline Division*, 9 CCH WORKMEN'S COMPENSATION DECISIONS ¶ 1395.

The facts showed that a chemical press operator had been walking on a public sidewalk outside of the plant building on his way to the parking lot provided by the employer. The injury occurred when the employee slipped and fell on some broken glass which had fallen from a plant window.

The court declared that the workmen's compensation board was correct in finding that the claimant continued in the course of his employment until he had used the employer's facility provided for the purpose of aiding his transportation to and from work.

[60] Cohen. *State Labor Legislation, 1937-1947* (The Bureau of Business Research, The Ohio State University, 1948), p. 12.

[61] "The more rational and constructive the framework of public control, the better the chance for constructive labor relations." (Slichter. *Industrial Relations Research Association Proceedings (1949)*, p. 8.)

Legal and Historical Background of the Right-to-Work Dispute

By GORDON S. SKINNER

This article discusses the legal ground rules within which the right-to-work controversy revolves. Eighteen states to date have enacted some form of right-to-work law. Since both the proponents and the opponents of this type of legislation can find some degree of judicial support, the author states that the people should decide which one of the two alternatives is the preferable one.

THE right-to-work law dispute has again focused the attention of the country on the problem of union security and the desirability of governmental control of this problem. While the right-to-work law problem is only a little more than a decade old, the basic problem of union security and its control is as old as the union movement itself. Almost as soon as workers formed labor unions, they thought of some form of union security. Perhaps a brief review of the union security issue will serve as a useful background to this discussion.

Basically, union security refers to employment arrangements whereby union membership is in some way made a condition of employment. The types of union security are many but can be reduced to a few basic forms—the closed shop, the union shop, the maintenance-of-membership agreement and the agency shop.

The closed shop is the tightest form of union security. Under such an arrangement only union members can be hired by an employer, and the workers must continue their union membership as a condition of employment—that is, a nonunion worker could never be hired, and a union worker once hired would lose his job automatically whenever he lost his union membership.

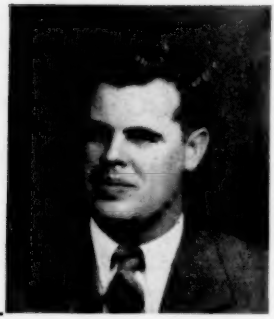
Under the union shop, any person could be hired initially by an employer, but within a certain period of time (commonly 30 days) the workers would have to join the union and maintain their union membership as a condition of employment with the same consequences as in the closed shop. As we shall note later, the Taft-Hartley Act currently permits a much restricted form of the union shop.

During World War II, the War Labor Board invented a compromise form of union security called "the maintenance-of-membership agreement." In this situation no worker has to join the union. However, those workers who do belong to the union and any workers who subsequently join the union must maintain their union membership as a condition of employment. Customarily, a maintenance-of-membership agreement permits union members to withdraw from membership without loss of their jobs at the beginning of each contract term during a short "escape" period. Again, as in the other types of union security, a worker who was required to maintain union membership and who loses such membership, voluntarily or involuntarily, would automatically lose his employment.

In the agency shop, a compromise arrangement, no worker is required to join the union but all must pay union dues as a condition of employment.

There are many other variations of union security, such as preferential hiring, the hiring hall and the work permit. Perhaps the oldest form of union security was the union rule that its members would not work for anyone who employed nonunion workers. This arrangement was involved in one of the first labor cases in the United States—the *Philadelphia Cordwainers* case of 1806.[1]

[1] Cited in Commons, *Documentary History of Industrial Society*, Vol. 3, pp. 59 and following.



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The basic case involved a strike in protest to a wage cut, and the court found that the workers involved were guilty of conspiracy. This was an adoption of an old English common law doctrine that made conspiracies (group actions to attain some objective) unlawful.

This rule was sweeping enough to outlaw union security activities and even the most ordinary strike, so that the closed shop was in very questionable status during the early years of our country. An indication of the status of the closed shop was given in the third part of the indictment in this case which stated that the workers had "unlawfully, perniciously and deceitfully formed into a club and combination with unlawful and arbitrary byelaws, rules and orders and agreed corruptly not to work for any master who employed a workman who was not in compliance with their rules." Further indications of the legal temperament of that time was stated by the presiding judge, who in his charge to the jury declared that the "turnout destroys the trade of the city and leaves the pockets of the whole community at the discretion of strikers . . . it interferes with the natural regulation of wages and prices by supply and demand . . . an individual worker may strike as much as he pleased as long as he did not do it together with others. . . . A combination of workmen to raise their wages may be considered in a twofold point of view: One is to benefit themselves . . . the other is to injure those who do not join their society. The Rule of law condemns both."

The conspiracy doctrine was modified and substantially altered in 1842. In that year, Chief Justice Shaw of the Massachusetts Supreme Court handed down his famous decision in *Commonwealth v. John Hunt and Others*.[2] This case also involved the shoemakers and the application of a closed shop agreement, in this case against an individual worker who had been expelled from the union for violation of its working rules. Instead of applying the conspiracy doctrine, in the then-current fashion, that all group activities of workers were illegal, Justice Shaw stated that a conspiracy was "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." By this ruling, unions became legal per se in the United States and the legal restrictions on their activity rested upon the joint tests of means and ends.

The Boston court had held that the shoemakers were engaged in the pursuance of an unlawful act by unlawful means. However, this was just legal terminology employed in all of the conspiracy cases. Justice Shaw felt that the means employed were lawful, stating that the shoemakers agreed that "they would not work for a person who, after due notice, should employ a journeyman not a member of their society. . . . we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests." Following this date, most judicial bodies in the United States would concur that a peaceful refusal to work was not in itself an "unlawful means." However, is the closed shop a "lawful objective"? Justice Shaw thought so, stating that "The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones."

Since there had been no allegation concerning the specific motives of the union in

[2] 45 Mass. 4 (Metcalf) III (1842).

pursuing the closed shop in this case, Justice Shaw felt that he could not infer that its purpose was dangerous or pernicious. In the years following 1842, courts uniformly followed the means-end test in determining the validity of union activities. Since both the means and the ends had to be lawful if the union were to escape the wrath of the court, both became topics of lengthy judicial controversy.

We are primarily concerned here with the issue of union security and its regulation. Thus, we shall restrict our discussion to the controversy concerning the validity of the "ends" or objectives of union activity—particularly the validity of the closed shop as a labor objective. Most of this determination was settled in the state courts. The different states could not agree on a uniformly accepted standard of measure; in fact, some states could not even make up their own minds in this area. During the late nineteenth and early twentieth centuries, two divergent points of view gradually emerged: one, a conservative point of view, was promulgated by the Massachusetts courts and followed by a majority of the states ruling on this issue at that time; the other, formulated by the New York courts, was more liberal and did not receive majority acceptance until the 1930's. It is perhaps ironic that the conservative rule was maintained by the Massachusetts courts whose own Justice Shaw had started the whole business with a very liberal interpretation a few decades before.

In formulating tests to judge the legality of the closed shop as a union objective, most courts settled on a rather nebulous principle. Most action of unions, or businesses for that matter, involves the search for additional gains for the group concerned. Invariably this pursuit of gain causes injury or damage to other parties. It would be impractical to outlaw all activity which in any way whatsoever injured another party. All business competition would fall before such a rule. Instead, the courts developed the doctrine that private actions were lawful if engaged in for the immediate benefit of the private group and where any damage to other parties was an incident of, rather than the purpose for, the activity—that is, the intentional infliction of harm on another is actionable unless justified.

In 1900, the Massachusetts high court held that a strike for a closed shop was unlawful in that it injured nonunion workers and was not justifiable as being in pursuit of any proper objective of the union concerned.[3] In 1905, the Massachusetts court rendered a judgment for a worker discharged under a closed shop agreement, declaring that the worker had a right to remain in employ and that "such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other." It stated further that "an interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some manner in which he has a right to act independently, is not competition. In such a case the action taken by the combination is not in the regular course of their business as employees, either in the service in which they are engaged or in effort to obtain employment in other service."[4]

It is interesting to note that in the very next year, 1906, the Massachusetts court permitted a jurisdictional dispute as a lawful dispute, declaring: "The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community."[5] The court differentiated this decision from its closed shop ruling of the previous year, stating that the jurisdictional strike was simply a statement demanding all of the work or none, whereas the previous case involved the forbidding of a particular category of artisans from doing their own kind of work.

At about the same time, the New York courts were gradually developing a far different principle. As late as 1897, a New York court had opposed the closed shop and had held that a union was liable in damages to a nonunion employee whose discharge it secured under a closed shop contract. The court observed: "While it may be true, as argued, that the contract was entered into, on the part of the (employer), with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention cannot aid the defense, nor legalize a plan of compelling workingmen, not in affiliation with the organization, to join it, at the peril of being deprived of their employment and of the means of making a livelihood."[6] At this time, the court held (similar to the Massachusetts court) that the closed shop

[3] *Plant v. Woods*, 176 Mass. 492 (1900).
[4] *Berry v. Donovan*, 188 Mass. 353 (1905).
[5] *Pickett v. Walsh*, 192 Mass. 572 (1906).
[6] *Curran v. Galen*, 152 N. Y. 33 (1897).

Welfare state ideas have great appeal to uninformed and misinformed people.—Glenn A. Green, associate director of the National Education Program.

was not of such immediate importance to the objectives of a trade union as to overrule damages resulting to others because of such an arrangement. However, in a closed shop case in 1902, the New York court changed its mind, saying at this time: "The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society." Further, the court stated, "so long as workmen must assume all the risk of injury that may come to them through the carelessness of co-employees, they have the moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services."[7] This had reference to the common law defense—the fellow-servant rule—which could counter damage suits of workers injured on the job.

Three years later, the New York court declared that "the surrender of individual liberty is but an extension of the right of freedom of action," and that unless it is specifically illegal or used merely to injure others with no ultimate purpose of selfish advantage, it is perfectly proper.[8]

In summary, the contending points of view were as follows: The conservative view held that unions might justify their harmful economic activities under the rule of permissible competition, but courts took an extremely narrow view of what constituted permissible competition. The liberal courts held to the same basic principle but had a very broad view of justifiable competition, including concerted activity for self-advancement and self-protection. Some liberal judges even went so far as to say that any union objectives were lawful if there were no tortious or criminal conduct, and that short of this the motive of the union was none of the courts' business.

The dual test of ends and means continues to be employed by state courts even today. Both the ends and the means had to fit into what the particular court thought to be lawful if the union activity was to be held exempt from court weapons. This same principle was restated by Chief Justice Taft of the United States Supreme Court in 1922 when he said: "Labor unions are recognized as legal when instituted for mutual help and lawfully carrying out their legitimate objects."[9] The distinction between means and ends is currently in effect in a unique way in the State of Colorado. In that state the closed shop is legal in and of itself, but a strike to obtain a closed shop is illegal.[10] Thus, if an employer and a union agree to include a clause requiring union membership as a condition of employment in their contract, it is perfectly lawful under state law and can be put into effect. On the other hand, it would be unlawful for a union to strike an employer in an effort to force him to agree to a union security clause in Colorado.

In the latter part of the nineteenth century, a new legal weapon appeared which was used to hinder the activities of labor unions. This was the labor injunction—an employing of the injunction, an old remedy in equity law, in a rather severe way to forestall union pressures against employers. The injunction was a peculiarly attractive weapon to employers because of its speed. No longer need the employer institute a lengthy legal battle to recover damages or to punish union leaders for unlawful activities. Now the activity could be stopped immediately through the medium of a court order enjoining the union action. The injunction did not really change the legal status of union security, however. The same means and ends tests were employed as before. The injunction simply added a weapon to the arsenal of moves available when a union ran afoul of the law.

Until the late 1920's, most governmental interference in labor-management relations had been the work of the judicial branches of the governments (state, federal and local). There were few statutes that expressly permitted or outlawed practices of union-management relations, and the few that did

[7] *National Protective Association v. Cumming*, 170 N. Y. 315 (1902).
[8] *Jacobs v. Cohen*, 183 N. Y. 207 (1905).
[9] *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184.
[10] Colorado Laws of 1943, Ch. 131, Sec. 7.

For a nation to try socialism is like an individual trying strychnine—you just try it once.

—George S. Benson

exist were not very successful. Perhaps a move toward union security in reverse, the Erdman Act of 1898 [11] had declared "yellow-dog contracts" illegal on the railroads of the United States. The yellow-dog contract was an agreement which a worker signed stating that he would not join or assist a labor organization in any way, and making this promise a condition of employment—that is, if a worker signed one of these contracts and subsequently joined a union, he forthwith lost his job. The United States Supreme Court held that the outlawing of the yellow-dog contract was unconstitutional. The Court said: "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . It was the legal right of the defendent Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged because the defendant employed some persons who were not members of a labor organization." [12]

Beginning in the 1920's, a sharp transition occurred in the role of the government in labor relations. The Railway Labor Act of 1926 [13] marked the first step in this transition. Before it was over, control of labor relations had passed from the judicial to the legislative and in turn the administrative branches of the government. While the courts have continued to play an important role in this field, their functioning is now mainly in interpreting statutes rather than in formulating their own rules of behavior.

Another piece of federal legislation that had an impact upon the union security issue was the Norris-LaGuardia Act of 1932.[14] This act limited the power of federal courts to issue injunctions in certain types of labor disputes. In addition, it implied that the activities mentioned in the act were not only to be unenjoinable but also were to be considered lawful in any other type of legal action. This implication was confirmed by the Supreme Court in 1941.[15]

Among other activities which were rendered immune by the Norris-LaGuardia Act were peaceful strikes, picketing and boycotts. Since these weapons were normally employed by labor organizations to back up their bargaining demands, including perhaps a demand for a closed or union shop, this law tended to give protection to union security. However, it is important to note that its rules applied only to the federal courts and not to state or local courts. Many states adopted little Norris-LaGuardia Acts affording the same protection to unions before courts of those states.

In 1933, Congress enacted the National Industrial Recovery Act [16] which provided for codes of "fair competition" to be established in industries through the participation of labor as well as industry representatives. Each code was to contain the famous Section 7a which provided that workers had the right to organize, form, join and assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for their mutual aid and protection. Unfortunately, there were no further provisions making this clause more explicit. Special administrative agencies were appointed to attempt to spell out rules and regulations to make Section 7a effective. In general, these agencies were not too successful in implementing the clause and in deciding specifically what to do about the union shop issue. There was some doubt as to whether or not the right to choose a representative of their own choosing would be violated if workers were compelled to join a specific union as a condition of employment. Before this controversy could be dissolved, the National Industrial Recovery Act was declared unconstitutional in 1935 [17] and was superseded by another more far-reaching statute of importance in this area—the National Labor Relations Act, more commonly known as the Wagner Act.[18]

Also in 1933, the bankruptcy act of that year prohibited trustees in bankruptcy from

[11] 30 Statutes at Large 424.
[12] *Adair v. U. S.*, 208 U. S. 161 (1908).
[13] 45 USC Secs. 151-164, and Supp. II, 45 USC Secs. 181-188.
[14] 29 USC Secs. 101 and following.
[15] *U. S. v. Hutcheson*, 3 LABOR CASES ¶ 51,110, 312 U. S. 219.
[16] 48 Statutes at Large 195.
[17] *Schechter Poultry Corporation v. U. S.*, 295 U. S. 495.
[18] Act of July 5, 1935, Pub. L. 198, 74th Cong.

entering with any union into a closed shop agreement which applied to employment in the enterprise where the person was acting as trustee.[19]

The Wagner Act brought about a significant change in labor-management relations in the United States and effectively altered the role of the government in this area. The heart of the Wagner Act was Section 7, a duplicate of Section 7a of the National Industrial Recovery Act, which guaranteed the right to organize and bargain collectively through representatives of their own choosing. It then spelled out a list of employer unfair labor practices; activities which the employer could not engage in; activities which it was felt would serve to negate the whole purpose of Section 7 had they been permitted. Among the employer unfair labor practices was one (Section 8(3)) which stated in part that it was an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This phrase by itself would outlaw all forms of union security since they involve discrimination with a purpose of encouraging union membership. However, there was a proviso to Section 8(3) which added, in part: "That nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9(a) . . . ." Thus the Wagner Act specifically permitted the closed shop and other forms of union security which made union membership a condition of employment. However, just how far did the Wagner Act go with regard to the closed shop? Did it override state laws or court decisions to the contrary? It took a while for these rules to be spelled out, and they were not conclusively settled until after the Taft-Hartley Act changed all of the rules of the game.

First, let us note a case involving the impact of the Norris-LaGuardia Act's restriction on injunctions in legitimate labor disputes. In this case,[20] the union demanded a closed shop from an employer even though none of his employees belonged to the union in question. Since the Wagner Act (in effect at the time) required that the closed shop proviso be limited to cases where the union was the certified representative of the workers in the bargaining unit, this employer could not have lawfully assented to the closed shop had he wanted to. The union picketed the employer's place of business, and the employer sued for an injunction against the picketing. The Supreme Court denied the injunction on the grounds that the Norris-LaGuardia Act prohibited federal courts from enjoining peaceful picketing.

Voting in industrial democracy is, in many instances, a far more serious duty and obligation than voting in political democracy.
—Jerome L. Toner, O.S.B.

During World War II, the union security issue became a heated controversy facing the War Labor Board. On November 14, 1941, President Roosevelt had stated that "the Government of the United States will not order, nor will Congress pass legislation ordering, a so-called closed shop . . . . That would be too much like the Hitler methods toward labor."[21] However, the issue would not die and the War Labor Board was forced to settle the problem in some way. They eventually chose the maintenance-of-membership agreement as a compromise of the issue. In the *Little Steel* case in 1942,[22] the War Labor Board required that contracts for maintenance of union membership be a part of collective bargaining agreements. Whenever union security was a disputed issue throughout World War II, the War Labor Board uniformly required that a maintenance-of-membership agreement be put into effect. This decision again raised the question of state versus federal rules on union security. The issue came to a head in 1943. Wisconsin had a law requiring a two-thirds affirmative vote of employees affected before a union security agreement could be made effective. The War Labor Board, basing its decision on the powers given in the war powers of the President, the War Labor Disputes Act and the Wagner Act, stated that it could rule on union security even though its ruling was not in accord with the Wisconsin statute. The board said:

[19] Act of March 3, 1933, 47 Stat. 1481.
[20] *Lauf v. Shinner*, 1 LABOR CASES ¶ 17,026, 303 U. S. 323 (1938).
[21] Letter to mine union and steel company officials, cited in *New York Times*, November 15, 1941.
[22] 1 War Lab. Rep. 325.

"The Board is satisfied that, were it not for the existence of the war emergency, the employees involved in this case would have had the right to demand maintenance of membership. . . . This right is granted to the employees under the National Labor Relations Act, and is a right which could be enforced in peacetime by strike. If the Wisconsin Employment Peace Act requires more than a majority of employees to vote for maintenance of membership under those circumstances, it must be subordinated to the provisions of the National Labor Relations Act." [23]

However, the issue was revived again after World War II. The states had continued to act in this area, in many cases contrary to the Wagner Act provision. However, more states were moving toward the liberal court doctrine promulgated by the New York courts earlier in the century. In 1942, it was estimated that of the states which had ruled on the closed shop issue, "more than twice as many states have now ruled upholding the closed shop than have ruled forbidding it." [24]

A New York court in 1943 said that "there is nothing in the present case before us to indicate that any injury was sought or intended to the plaintiffs or non-union members, but that the object of the contract and of the action of the defendant labor union is to advance its own interests and ability of its members through the closed shop, to meet on even terms their employers in present or future negotiations." [25] In the same year, the Massachusetts Supreme Judicial Court indicated that it then followed the same interpretation of the means-ends rule when it stated: "Such an agreement has been recognized as a legitimate means which a labor union may employ to secure for its members all the work of their employers that they are competent to perform." [26] However, the Massachusetts court in a case the same year held that while the union security provision itself was valid, concerted activity to obtain such a provision was illegal and could be enjoined—the old means-ends distinction.[27]

However, also during World War II, the first right-to-work laws were passed, and other states had rules like Wisconsin which

. . . decisions of the courts are not the law; they are the evidence of the law. Where decisions correctly present the law they should be followed and if they do not correctly present the law they should not be followed.

—*In re Balir*, 49 F. Supp. 59, 60.

did not outlaw the closed shop but restricted it in some form or other. The whole issue of state versus federal jurisdiction became clouded early in 1947 when the Supreme Court ruled:

"When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. . . . When federal administration has made comprehensive regulations effectively governing the subject matter of the statute . . . state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency." [28]

This particular case had not directly concerned the closed shop issue but others about the same time did. In 1948, in a case arising under the Wagner Act, the Supreme Court held that state laws could have effect in the union security issue. It said that "8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." [29] The court substantiated this rule by citing the legislative history of the Wagner Act. The Senate report on the bill that became the Wagner Act said: ". . . the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now be legally consummated. . . ." [30] The House report stated: "The bill does nothing to legalize the closed-shop agree-

[23] *Greenebaum Tanning Company*, 10 War Lab. Rep. 527.

[24] Carl R. Schedler, *Union Security* (Seventh Annual Economics Conference at Rollings College (1942)), p. 5.

[25] *Williams et al. v. Quill et al.*, 1 LABOR CASES ¶ 18,074, 277 N. Y. 1.

[26] *Hamer v. Nashawena Mills, Inc.*, 7 LABOR CASES ¶ 61,932, 315 Mass. 160.

[27] *Fashioncraft, Inc. v. Halpern*, 7 LABOR CASES ¶ 61,637, 313 Mass. 385.

[28] *Bethlehem Steel Company v. NYSLRB*, 12 LABOR CASES ¶ 51,245, 330 U. S. 767 (1947).

[29] *Algoma Plywood & Veneer Company v. WERB*, 16 LABOR CASES ¶ 65,013, 336 U. S. 301 (1948).

[30] S. Rept. 573, 74th Cong., 1st Sess., pp. 11-12.

Compulsory union membership is about as necessary as a hole in one's head.—McLellan Smith, Washington news correspondent.

ment in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal." [31]

In the meantime, the Congress had enacted the Labor Management Relations Act of 1947, more commonly called the Taft-Hartley Act.[32] The closed shop was no longer permitted but the act did allow a modified union shop. In the Taft-Hartley union shop, workers can be required to join the union after a period of time, which can be no less than 30 days, and must be required to maintain their union membership as a condition of employment. However, lack or loss of union membership can only legally result in discharge from the job when the union membership was denied or terminated for failure to pay union dues or initiation fees. At that time, several states already had statutes outlawing or restricting union security. In fact, nine states enacted such laws during 1947 itself. The Taft-Hartley Act sought to clear up the relationship of state and federal rules by including Section 14(b) which says: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." The Congress made its intentions very clear.

The conference committee report on this bill stated:

"Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to pre-empt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect." [33]

The original Taft-Hartley rule required that a vote be held among the employees in the bargaining unit before a union shop contract could be signed. This provision was eliminated in 1951. During the time that the rule had been in effect, the NLRB conducted 46,119 union shop-authorization elections with the union winning 44,795 or 97.1 per cent.

In spite of the rather clear language of the Taft-Hartley Act, state right-to-work laws were challenged on constitutional grounds. The Supreme Court upheld the validity of these state laws and cleared up some confusion on the federal-state controversy. The Court stated:

"This Court beginning at least as early as 1934 . . . has steadily rejected the due process philosophy enunicated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."[34]

Section 14(b) made it clear that no federal law was being violated and the court made it clear that no constitutional violation was involved, stating:

". . . the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

Before briefly discussing recent state action in this field, one further item of federal law is important. The Railway Labor Act had originally outlawed union security on the railroads. The law, as amended in 1934,[35] stated that it shall be unlawful for any carrier "to influence or coerce employees in

[31] H. Rept. 969, 74th Cong., 1st Sess., p. 17.
[32] Act of June 23, 1947, Ch. 120, 61 Stat. 140.
[33] H. Conf. Rept. 510, 80th Cong., p. 60.
[34] *Lincoln Federal Labor Union No. 19129, AFL v. Northwestern Iron & Metal Company* and *Whitaker et al. v. North Carolina* and *AFL, Arizona State Federation of Labor et al. v. American Sash & Door Company*, 16 LABOR CASES ¶ 64,898, 335 U. S. 525 (1949).
[35] Pub. L. 442, 73d Cong.

A major objective of the Bureau of Apprenticeship and Training is to stimulate greater awareness among the general public of the need for training.—Charles W. Davis, editor, *The Personnel Administrator.*

an effort to induce them to join or remain or not to join or remain members of any labor organization," and further outlawed the checkoff of union dues. This law was amended in 1951 to permit the union shop.[36] The amended statute reads:

"Notwithstanding any other provision of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier . . . and a labor organization . . . shall be permitted—

"(a) to make agreements, requiring as a condition of continued employment, that within sixty days following the beginning of such employment . . . all employees shall become members of the labor organization representing their craft or class . . . ."

The law also adds provisions similar to the Taft-Hartley Act which in effect reduce the requirement to the payment of the usual dues or initiation fees. The checkoff of union dues was also permitted. This law was immediately challenged but the Supreme Court upheld its provisions and declared that no state law would invalidate an agreement made pursuant to the provisions of the Railway Labor Act and that these provisions are constitutional. The Court stated:

". . . the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments. . . . There is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by State law is required to be a member of an integrated bar." [37]

Since the decision specifically emphasized the support of collective bargaining by dues, some state courts have subsequently held that such agreements cannot be effective within their states when the dues money is used in some manner (usually politically) other than for collective bargaining activities. These decisions have not yet been ruled upon by the Supreme Court.

The difference between the general Taft-Hartley rule and the Railway Labor Act rule is that the Taft-Hartley Act specifically permits state laws to take precedence when the state law is more restrictive than the federal law, while the Railway Labor Act states that its union shop permission is "notwithstanding" any other law, federal or state.

The above are the legal ground rules within which the right-to-work controversy revolves. Union security is now, and always has been, very prevalent in collective bargaining agreements. A 1954 survey by the Bureau of Labor Statistics of 1,716 labor agreements covering more than seven million workers found that 79 per cent of the agreements contained some form of union security.[38] However, in addition, the right-to-work movement seems to be continuing with some additional successes.

Today, 18 states have right-to-work laws. Five of these (Arizona, Arkansas, Florida, Nebraska and South Dakota) take the form of constitutional amendments, buttressed in all but Florida by enabling statutes that define the specific penalties. The others are legislative enactments (Alabama, Georgia, Indiana, Iowa, Mississippi, Nevada, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Virginia and Utah). In addition, Louisiana has such rules for agricultural workers, and three other states regulate union security. Colorado requires a three-fourths vote of the workers, Wisconsin a two-thirds vote and Kansas a majority vote before a union security agreement can be legal. Florida was the first of the states to have a right-to-work law, adopting a constitutional amendment in 1944, although the state has no effective enforcement statute. Delaware, New Hampshire and Maine have all repealed right-to-work laws, and Louisiana repealed her law as far as it applied in general in the state.

The right-to-work laws restrict all forms of union security, and ordinarily also outlaw the checkoff. A typical law is the Virginia statute, which says in part: "It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization." [39]

[36] Pub. L. 914, 81st Cong., 2d Sess.

[37] *Railway Employees' Department, AFL v. Hanson*, 30 LABOR CASES ¶ 69,961, 351 U. S. 225 (1956).

[38] *Monthly Labor Review*, Vol. 78, June, 1955.

[39] H. B. 5, Ch. 2, approved January 21, 1947.

The Georgia law states: "No individual shall be required as a condition of employment, or of continuance of employment, to pay any fee, assessment, or other sum of money whatsoever to a labor organization." Agreements of that type are declared to be contrary to the public policy of Georgia. Their law declares further: "It shall be unlawful for any employer to contract with any labor organization, and for any labor organization to contract with any employer, so as to make it a condition of employment of any individual, or of continuance of such employment, that such individual be or remain a member of a labor organization, or that such individual pay any fee assessment, or other sum of money whatsoever, to a labor organization." [40]

While it is always dangerous to attempt to prejudge issues, it would appear that the following generalities can be made about the legal status of union security. An agreement requiring all workers to support a union financially is not unconstitutional. If the federal government sees fit, its rules to that effect will overrule state laws. On the other hand, if the federal government desires to do so, it can cede its jurisdiction to the states in this area. While agreements of this sort are proper, so are state laws outlawing union security. In cases not covered by statutory law, the closed shop is legal in most states. Even the strike for union security would be lawful in a majority of jurisdictions. Thus, the battle is wide open. The Taft-Hartley union shop is O. K. and so are laws outlawing union security. With each side being blessed with some degree of judicial support, it is up to the people to decide which of the two alternatives is desirable. **[The End]**

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In the above case, the county had awarded contracts for construction of an airport terminal to a nonunion electrical contractor and to several union construction contractors. Because of a dispute with the electrical contractor, a union established a picket line at the construction site. The picketing induced employees of the construction contractors to refuse to work.

The Third Circuit agreed with the Board's finding that the picketing was done for the unlawful purposes of forcing (1) the construction contractors to cease doing business with the county and (2) the county to cease doing business with the electrical contractor.

The court noted that a governmental subdivision has no rights of its own, and that it is only "an arm for carrying out the interest of the general public." The court could see no objection to stopping an unfair labor practice which is injuring such an entity. Both the Board and the court relied on the Supreme Court's decision in *Teamsters, Local 25 v. New York, New Haven and Hartford Railroad Company*, 29 LABOR CASES ¶ 69,667 (1956). In the latter case it was decided that a railroad, although it was not an "employer" under the act, was entitled to protection from an unlawful secondary boycott. Although the Third Circuit admitted that "the point is not sun clear," it concluded that the Supreme Court decision was sufficient authority for giving governmental subdivisions protection from secondary boycotts.

The Wisconsin Supreme Court (*County of Door v. Plumbers, Local 298*, 34 LABOR CASES ¶ 71,506, May 6, 1958) disagreed with the holdings of the Board and the Third Circuit. The Wisconsin court, in affirming an injunction against picketing at a site where a county courthouse was being constructed, declared that the dispute was not within the exclusive jurisdiction of the Board. The court held that the county was not subject to the Taft-Hartley Act since governmental subdivisions are not included in the act's definition of "person" and are expressly excluded from its definition of "employer." The court declared in effect that Congress never intended to interfere with states and their governmental functions, and that no federal law should be construed to cover state functions unless it indicates a clear intention to do so.

In the Wisconsin case the county had obtained an injunction against picketing by a union to force a plumbing contractor to compel his employees to join the picketing union. The court held that this picketing constituted an unlawful interference with a governmental function of the county.

It appears that a United States Supreme Court decision will be needed to determine if a governmental subdivision is a "person" within the meaning of the Taft-Hartley Act.

[40] Georgia Annotated Code of 1933, Secs. 54-902 and 54-905.

The Union Quest for Recognition in Government Service

By JOSEPH KRISLOV

Government employment, especially on the state and local levels, has grown substantially in the past decade, but the unionization of government employees has not kept pace because of administrative opposition. This article examines the progress which the unions have made toward more recognition in this important area.

THE ATTITUDE of governmental authority in the United States toward the unionization of its own employees has never been friendly. Administrative and elected officials have generally resisted the attempts of unions to organize and represent employees. When employees persisted, governmental authority resigned itself to the existence of employee organizations. Rarely, however, were employee unions accorded the status which is widespread in private industry, that is, collective bargaining agreements with specific union recognition.

Government unions are now pressing for some type of formal recognition. The contracts obtained by workers in private industry were bound to have their influence on government employees. In some respects, a formalized, written understanding is of greater importance to employees in government than those of private industry. Government administrations change and verbal understandings made with previous administrators have little meaning. This article will examine the progress made by unions toward greater recognition in government service.

Federal

The organization of federal employees proceeded more rapidly than those in state and local government, but not without considerable opposition from governmental authorities. The civilian employees of the armed services at the arsenals and navy yards encountered opposition when they attempted to organize and present grievances. The outbreak of World War I and the necessity for efficient operation resulted in a more liberal policy in extending to union representatives and employees an opportunity to present their views. Opposition to unionism in the federal service was more extensive in the postal service. Leaders in the early postal organizations were frequently suspended or discharged because of union activities. When postal authorities realized that they could not destroy all employee organization, they frequently attempted to gain membership in the organization and thereby control it. Added to this opposition was the "gag rule" issued by President Theodore Roosevelt which forbade federal employees to attempt to influence Congress on any legislation. To overcome this opposition, postal workers finally succeeded in passing the Lloyd-LaFollette Act in 1912. The act formally established the right of postal workers to organize and the right of all federal employees to petition Congress. Despite these specific guarantees, postal authorities continued for a number of years to oppose the affiliated unions and to discharge postal union leaders.[1]

Although the Lloyd-LaFollette Act specifically guaranteed the right of only postal workers to organize, it was generally considered to permit all federal employees to join unions. Except for a specific prohibition against strikes by federal employees placed in the Taft-Hartley Act in 1947, very little additional legislation on the rights

[1] See Sterling D. Spero, *Government as Employer* (New York, 1948), pp. 93-203.

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of federal employees has emerged from the Congress. Unionization of federal employees has grown, but without the formal recognition accorded labor organizations in private industry. Only in a few federal agencies are written contracts negotiated. The Inland Waterways Corporation, the Tennessee Valley Authority, the Bonneville Power Administration and the Alaska Railroad are examples. Oral agreements and understandings between union representatives and administrators exist in other federal agencies.[2]

Unions in the federal service are now seeking to obtain amendments to the Lloyd-LaFollette Act which would provide formal recognition to unions representing employees in a unit and a statutory right to process grievances with final arbitration by a triparte panel.

The position of the unions seeking recognition was adequately summarized by William Doherty, president of the Letter Carriers:

"We simply want to be recognized—not by sufferance but by right. We seek statutory recognition not because we want or expect preferential treatment as Government employees, rather because we think that a Government which imposes upon private employers the responsibility of dealing with its employees should have no hesitancy in practicing what it preaches. If we do not seek preferential status, neither do we believe we should be set apart from employees in private industry. In this connection, we believe there is a point of moral justice involved and that it is the obligation of government to deal with its own public servants on a basis comparable to that which is imposed upon private employers." [3]

The essentials of these amendments have been reported favorably on separate occasions by both a Senate and House committee, but there has never been a vote in either body.

In their formative stages—in 1949 and 1950—these amendments were not opposed by the Civil Service Commission and some of the larger federal departments. In late 1954, there were reports that a Presidential executive order would be issued ordering agency heads to (1) consult with employees on internal personnel policy and (2) recognize the right of union officials to represent members on grievances.[4] During the hearings held in 1956, however, the Civil Service Commission, the Post Office and the Defense Department opposed the amendments. They argued that the legislation was not necessary inasmuch as (1) employee representatives have the opportunity to present their views to administrators and (2) government agencies have established machinery for grievance settlement. They maintained that the enactment of a specific statute would establish "detailed and inflexible procedures which could not be readily changed." Lastly, they objected strenuously to the arbitration feature which they claimed "would seriously hamper the efficient operation of agency programs." [5]

Local and State Government Employees

Attempts to organize significant numbers of state and local government employees were generally unsuccessful until the 1930's. However, two categories of employees—firemen and teachers—established national unions around World War I. Opposition from city authorities and boards of education destroyed numerous locals of both unions. Nevertheless, both organizations were able to survive, and one—the Firefighters—has succeeded in organizing much of its jurisdiction. Neither union has vigorously sought formal agreements and has usually regarded the right to present views to the administration as tantamount to recognition. In a few instances, however, locals of these two unions have obtained formal recognization.[6]

In the 1930's, two newly created unions—the American Federation of State, County and Municipal Employees, AFL, and the State, County and Municipal Employees, CIO—entered into the state and local government field. Although it had fewer members, the CIO affiliate vigorously demanded formal recognition of its locals. The AFL affiliate soon saw the value of collective agreements and began to request recogni-

[2] See work cited at footnote 1, at pp. 351-377. See also James A. Brownlow, "Collective Bargaining in the Federal Service," *Government Standard*, November 8, 1957, p. 3.

[3] 84th Cong., United States Senate, Committee on Post Office and Civil Service, "Union Recognition," p. 285.

[4] See work cited at footnote 3, at pp. 256-259 and 270-271.

[5] See work cited at footnote 3, at pp. 130-186.

[6] American Federation of Teachers, *Organizing the Teachers Profession* (Glencoe, Illinois, 1956), pp. 278-279; *American Teacher*, March, 1957, p. 1, and December, 1957, p. 17.

Labor relations are essentially human relations and, as such, cannot be examined in a test tube or controlled by a formula.

—Jerome D. Fenton

tion.[7] Both unions were moderately successful in obtaining some sort of recognition, primarily from local government units, that is, cities, counties and school boards. The number of these agreements has steadily increased. In 1957, President Arnold Zander of the newly merged American Federation of State, County and Municipal Employees (AFSCME) indicated that 445 local unions of councils had some type of formal agreement with the employing authorities.[8] This represented slightly less than one third of the locals in the federation. In addition, other unions—the Teamsters, the Street Railway Employees, the Building Service Employees, the Electrical Workers and the Transport Workers—have negotiated contracts with other local government units.

Legal authorities have generally advised against a governmental unit entering into an agreement with a union.[9] As a result, many of the so-called agreements are simply unilateral declarations by the governmental unit embodying some sort of recognition of the union, and other clauses covering wages, hours and working conditions. In 1956, the Civil Service Counsel of the AFSCME reported that of the 330 agreements in existence, 120 were bilateral working agreements and 210 were "unilateral statements of policy" or "resolutions."[10] Although unilateral recognition is more prevalent, the AFSCME has indicated its preference for bilateral agreements and will undoubtedly increase their number in the future.[11]

While governmental units have hesitated to sign formal bilateral agreements, those which have granted union recognition—either in a bilateral or unilateral manner—have usually granted exclusive recognition to the union. A study by the New York City Department of Labor shows that approximately 62 per cent of the governmental units which answered the department's request for information indicated that they granted the union exclusive recognition. Twenty-six per cent of the governmental units stated that they granted exclusive recognition for members only. A few of the governmental units indicated that they had granted the union a union shop or maintenance-of-membership clause.[12]

In early 1958, the Cities of New York and Philadelphia embarked on a labor relations program involving exclusive recognition of their labor unions. A bilateral agreement was signed in Philadelphia granting exclusive bargaining rights for 18,000 non-uniformed employees of District Council 33 of the AFSCME. In New York, Mayor Wagner issued an executive order providing exclusive recognition for a union receiving a majority vote in bargaining units.

Formal recognition for state employee locals is rare. In Illinois, the 1951 legislature authorized the state's colleges and universities to enter into agreements with employees. Negotiations between a personnel officer and union representatives are embodied into an agreement covering recognitions, grievances, seniority, hours, vacations, wages, sick leave and other conditions of employment. The agreement reached covers six campuses, but is never signed by the two parties. Instead, the labor representative signs a letter (prepared by the administration) containing the agreed conditions.[13] Agreements also exist in a few units in other states.[14]

A more frequent method utilized by state governors to accord recognition to unions is a unilateral declaration either in a formal executive order or an informal letter. Typical of the more formal type is the 1957 executive order by Governor Leader of Pennsylvania. The order assures every employee the "right to join or to continue as a member of any labor organization or employee organization." Administrative officials are ordered "to discuss with employees or their authorized representative in informal conference . . . all matters within their com-

[7] See work cited at footnote 1, at pp. 216-219.

[8] American Federation of State, County and Municipal Employees, *The Public Employee*, October, 1957, p. 1.

[9] Charles S. Rhyne, *Labor Unions and Municipal Employee Law* (Washington, 1946), pp. 150-155.

[10] American Federation of State, County and Municipal Employees, *Proceedings, Tenth Annual Convention*, p. 16.

[11] See work cited at footnote 8.

[12] City of New York, Department of Labor, *Extent of Recognition and the Bargaining Unit in Public Employment*, pp. 7-8, 16-18. For an evaluation of the results of granting the union shop, see Elmer Cross, "Experience with the Union Shop," *Public Management*, January, 1956, p. 7.

[13] Richard C. McFadden, *Labor-Management Relations in the Illinois State Service* (Urbana, Illinois, 1954).

[14] AFSCME claims agreements are in effect at Montana State Hospital, University of Colorado, Minnesota Railroad and Warehouse Commission, Utah State Training School and New Hampshire Highway and Public Welfare Departments.

petence," and "are encouraged to discuss . . . proposed new rules or modifications of existing rules in advance of their promulgation."

State No-Strike, Mediation and Recognition Laws

Following the wave of post-World War II strikes, a number of states enacted no-strike laws for their employees. Generally, the laws provided simply that employees should not strike, and stated a number of civil penalties when the law was violated. An employee who struck was to be terminated by the governmental unit. Most of the no-strike laws provided that the terminated employee might be rehired, but that upon reappointment his compensation could not be increased for a specific period. In addition, an employee who was rehired would remain on probation for an additional period. For many of the states which passed no-strike laws during this period, these laws were the only statutes dealing with labor-management relations for their own employees.

The doctrine that "public employees could not strike" had long been part of the common law. Nevertheless, in two states the no-strike statutes were challenged in the courts. Two state supreme courts—New York and Michigan—have held the acts constitutional.[15] It is doubtful that these decisions in two liberal states will be overlooked by courts in other states should the no-strike laws be challenged there. Barring a sudden change in public opinion and political sentiment, it is doubtful that the no-strike laws will be repealed. The contribution that no-strike laws make to good labor-management relations in government has long been questioned by impartial observers.[16] Nevertheless, the no-strike laws have focused attention on labor-management relations in government and may become the vehicle for wider recognition of unions in state and local government service.

Most of the no-strike laws specifically permitted employees to present grievances —a right which had not been uniformly recognized. In addition, in three states—Pennsylvania, Michigan and Minnesota—a formal procedure was written into the law to handle unresolved grievances. In Michigan, unresolved disputes may be submitted to the state mediation board. The findings of the panels or the mediation board are merely advisory and not binding on the parties.

While the panel system has advantages, its shortcomings have been recognized by both public administrators and union representatives. Management representatives believe that the fact-finding procedure can be too easily abused by minority groups or unions. In addition, every grievance, no matter how trivial, may ultimately be presented to a board. Union representatives point out that there is no method of securing compliance once the award is made. In addition, the right of the "union"—and not of the "employee"—to process a grievance is not specifically stated. This is particularly important in Pennsylvania because of a court decision involving two discharged state employees. One of the employees claimed that he was discharged because of union activity. The state supreme court ruled that the governmental unit need not proceed with the panel inasmuch as the two discharged employees were no longer "employees" and were not entitled to a panel. (*Broadwater v. Otto*, 370 Pa. 611, 88 Atl. (2d) 878 (1952).) Obviously, employees will hesitate to utilize a grievance procedure under these circumstances.[17]

Although the panel system had been utilized with some success in Minnesota,[18] public employees in that state secured additional amendments to their no-strike law in 1957. The amendments specifically grant the public employee the "right to form and join labor organizations" and require the governmental unit "to meet with the representatives of the employees at reasonable times in connection with . . . grievances and conditions of employment." The amendments also authorize the state mediation board to conduct elections to determine if employees in a given unit desire representation. The AFSCME has indicated that it will probably seek similar legislation in other states.

Summary

Government employment, particularly on the state and local level, has grown substan-

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[15] *New York City Transit Authority v. Loos et al.*, 30 LABOR CASES ¶ 70,129, 154 N. Y. S. (2d) 209 (1956); *City of Detroit v. Division 26 of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America et al.*, 20 LABOR CASES ¶ 66,708, 332 Mich. 237, 51 N. W. (2d) 228 (1952).

[16] American Bar Association, *Second Report of the Committee on Labor Relations of Government Employees*, June 27, 1955, p. 2.

[17] *The Public Employee*, February, 1953, p. 12.

[18] Harry P. Cohony, "Membership of American Trade Unions in 1956," *Monthly Labor Review*, October, 1957, p. 1208.

The Supreme Court and the NLRB

By JOSEPH A. JENKINS

An analysis is presented of United States Supreme Court cases, handed down in the last 22 years, which reviewed NLRB decisions. After noting the many legal problems that have been solved, the author discusses those which still need solutions. Among these is the validity of "hot cargo" clauses. This paper was delivered before the Texas Hotel Association, San Antonio, Texas.

TWENTY-TWO YEARS ago the first National Labor Relations Act was born. That act guaranteed to employees the right to organize and bargain collectively through representatives of their own choosing. It made it an unfair labor practice prohibited by law for employers to interfere with such right or to refuse to bargain collectively with the representatives chosen by their employees. The act applied to industries throughout the nation—to those engaged in production and manufacture, as well as to those engaged in commerce, literally speaking. This appeared to make it conflict with important Supreme Court decisions drastically limiting the scope of the federal government's authority over interstate commerce, including some decisions on which the ink was scarcely dry.[1]

Those who drafted and enacted the Wagner Act had grave doubts as to whether the Supreme Court would find it constitutional.[2] They had attempted to meet the Court's objection to the National Industrial Recovery Act as an unconstitutional delegation of legislative power by providing in the Wagner Act more specific standards of delegation, transferring administration from the industry group to an administrative agency patterned after the Federal Trade Commission, and by substituting judicial enforcement for the sanction of public disapproval[3] as provided in NRA.

The two main questions involved in the constitutionality of the Wagner Act were (1) whether it was consistent with the requirements of due process of law and (2) whether the commerce clause supported the exercise of federal jurisdiction. During the first month, before the first National Labor Relations Board had accepted any cases, a voluntary committee of more than 50 lawyers, many of real distinction, advised the public that the act was unconstitutional.[4] They said it was established constitutional doctrine that for the government to say to an employer that he could not with impunity discharge an employee for joining a union was so great an interference with the employer's rights as to amount to a denial of due process of law.[5] They also opined that it was beyond the constitutional powers of the federal government to regulate labor relations except in interstate transportation.[6] These questions were almost immediately raised by employers challenging the validity of the act in suits seeking to enjoin the conduct of Board proceedings. Many United States district courts granted injunctions against the mere holding of administrative hearings by the Board on the ground that the hearings were a useless and expensive

[1] *Schechter Poultry Company v. U. S.*, 295 U. S. 495 (decided May 27, 1935).

[2] *Legislative History of the N. L. R. A., 1935* (United States Government Printing Office, 1949), Vol. II, pp. 2302-2411 (remarks of Senator Hastings).

[3] See statement of Representative Connery of June 3, 1935, in work cited at footnote 2, at p. 3006.

[4] National Lawyers Committee of the American Liberty League.

[5] *Adair v. U. S.*, 208 U. S. 161 (1908); *Coppage v. Kansas*, 236 U. S. 1 (1915).

[6] *Hammer v. Dagenhart*, 247 U. S. 251 (1918). Five years earlier, the Court had upheld the constitutionality of the Railway Labor Act, in *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 (1930).

The author is a member of the National Labor Relations Board.

annoyance to the employer and based upon a clearly unconstitutional act.

The act was virtually ineffective until the constitutional questions were resolved. In May, 1936, the Court threw further doubt as to their resolution by its decision invalidating the Bituminous Coal Act, which sought to regulate labor relations in the coal-mining industry, as an unconstitutional delegation of legislative power and beyond the reach of the commerce clause.[7] In the 1934-1936 period, the Supreme Court rendered 12 decisions declaring invalid legislative measures of the New Deal.

However, starting in March, 1937, that tribunal upheld every New Deal law presented to it, including some that were basically similar to earlier statutes which it had nullified. A veritable revolution in the jurisprudence of the Supreme Court—appropriately characterized as "Constitutional Revolution, Ltd."[8]—took place. The Supreme Court recognized that to attempt, Canute-like, to hold back indefinitely the waves of ever-increasing governmental authority was for it to set itself an impossible task. In 1951, Justice Roberts (the man whose switch, more than anything else, is said to have "saved the Nine" in 1937) declared: "Looking back it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."[9]

On April 12, 1937, the Court decided the first five Board cases to reach it. In *Jones & Laughlin Steel Corporation*, a five-to-four majority of the Court upheld the constitutionality of the National Labor Relations Act of 1935. The precedents limiting the scope of the federal government's authority over interstate commerce were not followed. "These cases," laconically stated the Court, "are not controlling here."[10] Instead, the Court gave the federal power over interstate commerce its maximum sweep. Mines, mills and factories, whose activities had formerly been decided to be "local" and, hence, immune from federal regulation, were held to affect interstate commerce directly enough to justify Congressional control. There is little doubt that, as the dissenting Justices in *Jones & Laughlin* protested, the Congress had exercised a power of control over purely local industry beyond anything theretofore deemed permissible. Indeed, as the dissenters accurately stated, in characterizing the effect of the Court's reinterpretation of the commerce power: "Almost anything—marriage, birth, death—may in some fashion affect commerce."[11] Rejecting the due-process argument, the Court noted:

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustment and agreements which the Act in itself does not attempt to compel."[12]

Later, Robert H. Jackson termed that decision the most far-reaching victory ever won in the Supreme Court on behalf of labor.[13]

After that decision, most of the important industries of the country recognized the act as the law of the land and began to obey it. Some did not obey it. The Board was in business. So were the courts.[14]

The Board was charged with effectuating different and sometimes irreconcilable goals, for example, "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association and designation of representatives of their own choosing." Granting an election in the face of an existing contract may afford "full freedom" of designation of representative, but it hardly serves to stabilize working conditions and it may be doubted

[7] *Carter v. Carter Coal Company*, 298 U. S. 238 (1936) (Justice Cardozo dissenting).

[8] Corwin, *Constitutional Revolution, Ltd.* (1941); Schwartz, *The Supreme Court; Constitutional Revolution in Retrospect* (1957), pp. 23-25.

[9] Owen J. Roberts, *The Court and the Constitution* (Harvard University Press, 1951), p. 61.

[10] 1 LABOR CASES ¶ 17,017, 301 U. S. 1, 41.

[11] At p. 99.

[12] At p. 45.

[13] *The Struggle for Judicial Supremacy* (1941), p. 214.

[14] From 1935 to June 30, 1956, the courts of appeals have reviewed 1,633 Board decisions, enforcing in full 977, or 59.8 per cent, and setting aside 284, or 17.4 per cent. Of the remainder, 327 modified the Board orders, 11 partially enforced and partially remanded to the Board, and 34 remanded to the Board (*Twenty-first Annual Report of the National Labor Relations Board* (1956), p. 183). Approximately six per cent of these decisions of the courts of appeals were reviewed by the Supreme Court. In all, the Court has reviewed 110 Board decisions, enforcing in full approximately 70 per cent, modifying approximately 18 per cent and setting aside 12 per cent. There are no available statistics as to the number of petitions for certiorari denied by the Court.

The supervisor is the starting point of most all situations where trouble could arise. As the liaison man between upper levels of management and employees, it is imperative that he be qualified to cope with many situations.—Harris W. Botruff, vice president, industrial and public relations, Sealed Power Corporation.

if it encourages "collective bargaining." The Board was empowered to prevent any person from engaging in any unfair labor practice affecting commerce listed in Section 8 in general terms, by such order as will effectuate the policies of the act. It was empowered to decide whether an employer unit, craft unit, plant unit, or subdivision thereof was the unit appropriate for the purposes of collective bargaining. Its power was not to be "affected by any other means of adjustment established by agreement, law, or otherwise." (Section 10(a).)

Each substantive word in Section 8 raised questions, and has been questioned. Each power granted to the Board raises questions, and has been questioned. The 1947 amendments, which changed the Wagner Act into the Taft-Hartley Act, sought to bring about a new balance of power in collective bargaining, giving the Board new duties of protecting "the rights of the public in connection with labor disputes, the rights of individual employees in their relations with labor organizations whose activities affect commerce" as well as with employers,[15] and the legitimate rights of both employees and employers in their relations affecting commerce. To these ends, significant changes were made, each creating new problems in statutory construction for the Board and for the courts. Wagner Act decisions of the Supreme Court were reflected in certain of the 1947 amendments; some were rejected and others were approved. For example, the Court, having deference for the expertise of the Board in interpreting general statutory terms, had sustained the Board's holdings that "independent contractors" and "foremen" were "employees" and entitled to the protection of the act.[16] Congress rejected these interpretations by amendment of Section 2(3) and Section 14(a). The Court had similarly sustained the Board's finding that an employer was responsible for the acts of third persons if the employees had just cause to believe such persons were acting for the employer.[17] Congress narrowed the base for imputing responsibility to employers in Section 2(2). Both the Court and the Board had recognized the right of employers to express their views to employees on labor matters, provided that threats and promises were avoided as means of persuasion.[18] Section 8(c) incorporated this recognition.

The first decisions of the Supreme Court on the 1935 Act presented significant constitutional problems. After *Jones & Laughlin* and the other due-process questions decided the same day, the Supreme Court had few constitutional questions to decide under the Wagner Act. However, there is serious question whether the pre-1937 Court would have found adequate statutory limitation by prescribed standards for the exercise of the powers delegated to the Board.[19] No serious attack was made on the adequacy of the standards for the broad delegation of power to the Board. When, as a collateral matter, the adequacy of the standards for the Board's determination of the unit appropriate for the purposes of collective bargaining was raised, the Court found adequate the touchstones provided by Congress: "the employer unit, craft unit, plant unit, or subdivision thereof."[20] The Court would have dismissed any further attack by finding the general terms of the statute to be "as concrete as the complicated factors for judgment in such a field of delegated authority permit."[21] Few questions concerning the fairness of Board procedures or procedural due process came to the Court.

After the 1947 amendments, the Court was barraged with constitutional contentions from labor organizations. It held that the proscription of secondary boycotts did not violate the First, Fifth or Thirteenth

[15] See Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 *Harvard Law Review* 46 (1947).

[16] *NLRB v. Hearst Publications, Inc.*, 8 LABOR CASES ¶ 51,179, 322 U. S. 111 (1944) (independent contractors); *Packard Motor Car Company v. NLRB*, 12 LABOR CASES ¶ 51,240, 330 U. S. 485 (1947) (foremen).

[17] *International Association of Machinists, Tool & Die Makers Lodge 35 v. NLRB*, 3 LABOR CASES ¶ 51,103, 311 U. S. 72 (1940).

[18] *NLRB v. Virginia Electric & Power Company*, 5 LABOR CASES ¶ 51,124, 314 U. S. 469 (1941).

[19] Cf. *Panama Refining Company v. Ryan*, 293 U. S. 388, 430 (1935).

[20] *Pittsburgh Plate Glass Company v. NLRB*, 4 LABOR CASES ¶ 51,122, 313 U. S. 146 (1941).

[21] See *National Broadcasting Company v. U. S.*, 319 U. S. 190, 216 (1943).

Amendments.[23] It found that injunctions against strikes by labor organizations did not violate the Thirteenth Amendment.[24] It upheld the constitutionality of the non-Communist affidavit provision in Section 9(h) as it relates to a requirement that union officers be "not a member of the Communist Party or affiliated with such party."[25] It would seem that few significant constitutional questions involving the present act remain undecided.

I should like to sketch broadly the many other questions which have confronted the Board and to which the Supreme Court has furnished answers, and to point out some questions which remain for the Court to decide. However, I will refrain from discussing the jurisdictional dilemma at any length.

General Scope of Board's Authority

Many of the resolved questions involve the relation of the Board, as an administrative agency, to the courts. During the first year after July 5, 1935, Board lawyers were faced with 83 petitions for injunctions against the conduct of Board proceedings, each of them based on the claim that the proceeding would cause irreparable damage to the petitioner.[26] The question of the power of the district courts to disrupt proceedings was answered by the Supreme Court by conditioning judicial relief upon an exhaustion of administrative remedies.[27]

From the beginning, the Board has been faced with the question of which of its actions are subject to judicial review and the scope of such review. The Court early decided that directions of elections and certifications are not directly reviewable.[28] It also indicated that such proceedings might be reviewable in an original equity suit in the District of Columbia if there was a "showing of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process."[29] The requisite "showing" for review remains unknown. In *Leedom v. Kyne*,[30] the United States Court of Appeals for the District of Columbia Circuit sustained the district court's jurisdiction to set aside a certification in which the Board had departed from the provision in Section 9(b)(1) by including professional employees and a few nonprofessional employees in the same bargaining unit without giving the professional employees an opportunity to vote against such inclusion. The court regarded the opportunity to obtain judicial review by means of an appeal from a final order in an unfair labor practice proceeding as too remote and conjectural to be considered, under the circumstances, an adequate remedy to the Board's "violation of a statutory requirement." The Supreme Court has granted certiorari.[30] From the beginning, the Court imposed upon itself and upon reviewing courts judicial restraint in substituting judicial judgment for the judgment of the Board, especially in findings of fact or determination of questions of mixed fact and law, such as the meanings of general statutory terms, with the exception of the meaning to be given "affecting commerce" or "substantial obstructions" to the free flow of "commerce."[31] The 1947 amendments enlarged the scope of judicial review.[32]

[23] *IBEW, Local 501 v. NLRB*, 19 LABOR CASES ¶ 66,348, 341 U. S. 694 (1951).

[24] *NLRB v. Local 74, United Brotherhood of Carpenters & Joiners*, 19 LABOR CASES ¶ 66,349, 341 U. S. 707 (1951).

[25] *American Communications Association v. Douds*, 18 LABOR CASES ¶ 65,760, 339 U. S. 382 (1950); *Osman v. Douds*, 18 LABOR CASES ¶ 65,807, 339 U. S. 846 (1950). The Court was equally divided on the constitutionality of the requirements relating to belief in and teaching of "the overthrow of United States Government by force." The question of the impact of the decision in *Yates v. U. S.* (June 17, 1957) upon Section 9(h) is outside the scope of this speech.

[26] *First Annual Report of the NLRB* (1936), p. 49; *Second Annual Report of the NLRB* (1937), pp. 31, 36-40.

[27] *Myers v. Bethlehem Shipbuilding Corporation*, 1 LABOR CASES ¶ 17,024, 303 U. S. 41 (1938); *Newport News Shipbuilding Corporation v. Schauffler*, 1 LABOR CASES ¶ 17,025, 303 U. S. 54 (1938).

[28] *In re NLRB*, 1 LABOR CASES ¶ 17,036, 304 U. S. 486 (1938).

[29] *Inland Empire District Council, etc. v. Millis*, 9 LABOR CASES ¶ 51,211, 325 U. S. 697 (1945).

[30] *Leedom v. Kyne*, 33 LABOR CASES ¶ 70,954, 249 F. (2d) 490 (CA D. of C., 1957).

[30] Cert. granted January 13, 1958, 355 U. S. 922.

[31] *P. S. Guss v. Utah Labor Relations Board*, 32 LABOR CASES ¶ 70,563, 353 U. S. 1; *Amalgamated Meat Cutters, Local 427 v. Fairlawn Meats, Inc.*, 32 LABOR CASES ¶ 70,564, 353 U. S. 20; and *San Diego Building Trades Council v. Garmon*, 32 LABOR CASES ¶ 70,565, 353 U. S. 26 (March 25, 1957).

[32] For example, *Consolidated Edison Company v. NLRB*, 1 LABOR CASES ¶ 17,038, 305 U. S. 197 (1938); *NLRB v. Hearst Publications, Inc.*, 8 LABOR CASES ¶ 51,179, 322 U. S. 111 (1944). See also *Universal Camera Corporation v. NLRB*, 19 LABOR CASES ¶ 66,191, 340 U. S. 474, 490 (1951), where the Court noted: "Our power to review the correctness of application of the present standard [that the findings of the Board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole] ought seldom to be called into action."

Similar deference has been paid to the grant to the Board of authority to fashion a remedy which will effectuate the policies of the act.

Board's Power over Remedies

The Court early sustained the Board's power permanently to forbid an employer to recognize an employer-dominated organization as the representative of his employees.[33]

It has upheld the Board's power (1) to order an employer to reimburse employees for dues checked off and paid over to a dominated organization,[34] (2) to order back pay for job applicants denied employment because of their union affiliations or sympathies,[35] (3) to ignore state unemployment benefits in calculating back pay[36] and (4) to change its method of calculating back pay from the lump-sum method to the calendar-quarters method.[37]

However, in an early case, the Court held that the Board had exceeded its powers in ordering an employer to reimburse government relief agencies for sums paid to 8(3)'s (those discriminatorily discharged) and thereafter deducted from their gross back pay.[38]

The Court noted in a later case (*Southern Steamship Company*, 5 LABOR CASES ¶ 51,139, 316 U. S. 31, 46) that the Board's power to order "'such affirmative action, including reinstatement of employees . . . as will effectuate the policies of the Act' . . . is of considerable breadth, and the courts may not lightly disturb the Board's choice of remedies. But . . . this discretion has its limits."

The limit to this discretion was before the Court this term in the *Bowman* case.[39] There the Board applied its usual remedy in cases of unlawful assistance to a union by ordering the employer not to recognize the assisted union unless it was certified by the Board. Because the assisted union was not in compliance with the filing requirements of the act and could not be certified without complying, the court of appeals, citing the Supreme Court's *Oak Flooring* decision,[40] struck the requirement of certification from the Board's order.[41] The Board required the employer to post a notice which mentioned by name the assisted union's rival. The court of appeals eliminated this requirement on the ground that it might be taken to indicate a Board preference for the named union. If the Board's order exceeded its authority, the question remained whether the court of appeals could rewrite the order rather than remand it to the Board for consideration of other possible remedies. In seeking certiorari on this latter point, the Board pointed particularly to the Supreme Court's observation in the *Phelps Dodge* case:

"Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."[42]

The Supreme Court held that the Board's discretion is limited by the requirement that the remedy must be "appropriate" to the

Man is free and society has lasting order and stability only when the rule of law is accepted not only between individuals but also between the individual and his government. —William P. Rogers, Attorney General of the United States.

[33] *NLRB v. Pacific Greyhound Lines*, 1 LABOR CASES ¶ 17,028, 303 U. S. 272 (1938); *NLRB v. Pennsylvania Greyhound Lines*, 1 LABOR CASES ¶ 17,027, 303 U. S. 261 (1938); *NLRB v. Newport News Shipbuilding & Dry Dock Company*, 2 LABOR CASES ¶ 17,050, 308 U. S. 241 (1939); *NLRB v. Falk Corporation*, 2 LABOR CASES ¶ 17,053, 308 U. S. 453 (1940); *H. J. Heinz Company v. NLRB*, 3 LABOR CASES ¶ 51,107, 311 U. S. 514 (1941); *Westinghouse Electric & Manufacturing Company v. NLRB*, 3 LABOR CASES ¶ 51,115, 312 U. S. 660 (1941); *NLRB v. Southern Bell Telephone & Telegraph Company*, 6 LABOR CASES ¶ 51,160, 319 U. S. 50 (1943); *Wallace Corporation v. NLRB*, 9 LABOR CASES ¶ 51,187, 323 U. S. 248 (1944).

[34] *Virginia Electric & Power Company v. NLRB*, 7 LABOR CASES ¶ 51,161, 319 U. S. 533 (1943).

[35] *Phelps Dodge Corporation v. NLRB*, 4 LABOR CASES ¶ 51,120, 313 U. S. 177 (1941).

[36] *NLRB v. Gullett Gin Company*, 19 LABOR CASES ¶ 66,123, 340 U. S. 361 (1951).

[37] *NLRB v. Seven Up Bottling Company of Miami, Inc.*, 22 LABOR CASES ¶ 67,329, 344 U. S. 344 (1953).

[38] *NLRB v. Republic Steel Corporation*, 3 LABOR CASES ¶ 51,101, 311 U. S. 7 (1940).

[39] *NLRB v. District 50, UMW, and Bowman Transportation, Inc.*, cert. granted, 352 U. S. 999 (February 25, 1957).

[40] *United Mine Workers v. Arkansas Oak Flooring Company*, 30 LABOR CASES ¶ 69,907, 351 U. S. 62 (1956), which the Board in its brief in the *Bowman* case views as holding merely that a union's failure to comply with the filing requirements did not authorize a state court to act in a situation coming within the ambit of the federal act.

[41] *NLRB v. District 50, UMW, and Bowman Transportation, Inc.*, 31 LABOR CASES ¶ 70,248, 237 F. (2d) 585 (CA D. of C., 1956).

[42] Cited at footnote 35, at p. 194.

Many companies have developed planned training programs to meet their replacement needs. Some firms are also making allowance for future manpower requirements for growth and expansion.—Charles W. Davis, editor, *The Personnel Administrator*.

circumstances of the "particular situation," and found that the Board had abused its discretion by conditioning figure recognition of an assisted noncomplying union on a certification rather than upon "an election, after a lapse of time and under proper safeguards."[43] It sustained the Board's contention that the reviewing court had no authority to modify the Board order, vacating the judgment with instructions to remand to the Board for further proceedings. The decision indicates that the Board has power to make "an arrangement with another appropriate agency, state or federal, for the conduct of the election under conditions prescribed by the Board." This suggestion raises unexplored possibilities in the cooperation between federal and state agencies in the implementation of the federal act.

The relation of remedy to policy also involves questions of the limits to judicial discretion to withhold the judicial remedy of contempt.

The Court has pointed out that the act "contemplates cooperation between the Board and the Courts of Appeal both at the enforcement and the contempt stages in order to effectuate its purposes. It consigns certain statutory functions to each, and where the Board has acted properly within its designated sphere, the court is required to grant enforcement of the Board's order. The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. The granting or withholding of such remedial action is not wholly discretionary with the court. This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence."[44]

This statement raises the question of the limits to be placed upon the discretion of the Court. It also raises the question whether the Court would still find, as it did in 1940, that only the Board may bring contempt proceedings.[45]

But these are technical problems, of more interest to the Board than to those who are affected by the Board's policy determinations in matters of substantive law.

The Supreme Court's decisions on matters of substantive labor law may be divided, for convenience of discussion, into four main categories: (1) limits to the scope of Section 7, (2) the bargaining process, (3) the collective bargaining contract and (4) unfair labor practices.

Limits to Scope of Section 7

Despite the broad language of Section 7, the Court early excluded a number of concerted activities from the protection of the Wagner Act by refusing to find unfair labor practices in discharges or other disciplinary action. In others, the Court appeared to balance the employees' need for concerted activity against the employer's right to prevent disruption of his business.

The earliest cases involving charges of discrimination in hire or tenure of employment illustrate both principles. The right of an employer to engage in business during an economic strike was balanced against the right of employees to strike by permitting him to hire permanent replacements during the strike and requiring only that he reinstate "as many of the strikers as there were vacant places to be filled" at the end of the strike, on a nondiscriminatory basis.[46] Strikers who engaged in a sit-down strike—"an illegal seizure and retention of the buildings" of the employer—effectively preventing him from continuing to engage in his own business during a strike, were denied reinstatement because such a strike "was illegal in its inception and prosecution."[47] In the *Fansteel* case, the Court said:

[43] *NLRB v. District 50, UMW, and Bowman Transportation, Inc.*, 34 LABOR CASES ¶ 71,257, 355 U. S. 453 (1958), decided February 3, 1958. I do not have time here to explore the possible further implications of this decision upon the Board's handling of questions arising under Sec. 9(c) and involving noncomplying unions claiming to represent employees.

[44] *NLRB v. Warren Company, Inc.*, 29 LABOR CASES ¶ 69,595, 350 U. S. 107 (1955).

[45] *Amalgamated Utility Workers v. Consolidated Edison Company*, 2 LABOR CASES ¶ 17,055, 309 U. S. 261 (1940).

[46] *NLRB v. Mackay Radio & Telegraph Company*, 1 LABOR CASES ¶ 17,034, 304 U. S. 333, 346 (1938).

[47] *NLRB v. Fansteel Metallurgical Corporation*, 1 LABOR CASES ¶ 17,042, 306 U. S. 240 (1939).

This year about 390,000 bachelor's degrees and an additional 80,000 graduate degrees will be granted by our colleges and universities. This means that in the next few months literally thousands of well trained men and women will be entering the labor market. —James P. Mitchell

"When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve."

The outside employees who helped them hold the company's building were similarly denied reinstatement. This decision left open the question whether such tactics would have been protected had the employees engaged in an unfair labor practice strike rather than one which the Court found to have been economic. That question was answered in the negative by the Court in *Southern Steamship* by refusing reinstatement to sailors who struck to protest their employer's refusal to bargain with a certified union, but whose strike amounted to mutiny under other federal statutes.[48] In a recent case,[49] a majority of the Supreme Court described the *Fansteel* case as "discharge, for tortious conduct, violence or sit-down strike," and *Southern Steamship* as "discharge of seamen for disobedience on shipboard while away from home port." This rationale leaves open to question whether the Court would balance the tort against the provocation and the extent to which the Court would find strikers who had not directly participated in the unprotected activity barred from reinstatement because of the character of the strike.

This case which distinguishes *Fansteel* and *Southern Steamship* is the only case which has come up to the Court under the Taft-Hartley Act involving analogous employee misconduct—the "handbill" case of 1953.[50] In the "handbill" case, when an impasse in bargaining developed, a group of television station technicians began picketing their station when they were off duty. During this picketing, some of them prepared and distributed a handbill which strongly assailed the quality of the station's programs. It was signed merely "WBT Technicians," and made no reference to their union or the labor controversy. The company thereupon discharged ten technicians for distributing the handbill. Finding this conduct of the employees "hardly less 'indefensible' than acts of physical sabotage," the Board held that it constituted cause for discharge. It treated the matter as separate from the labor controversy.[51] A majority of the Court, in upholding the Board's order, declared:

"Even if the attack were to be treated . . . as a concerted activity wholly or partly within the scope of those mentioned in Section 7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act."

The Court indicated that the evil of the employees' conduct was "detrimental disloyalty" to their employer's business.[52]

This decision leaves open the question of the extent to which employees are protected by Section 7 for engaging in "other concerted activities" and the meaning to be accorded "for the purpose of . . . other mutual aid." It also raises questions concerning the extent to which employees may, with impunity, criticize their employer or his business in public.

The Court has apparently similarly balanced the employees' right to information concerning unionism and organizational activity against the employer's right to prevent disruption in his business and to determine the uses to which his property can be put. There is no disruption to an employer's business from employees passing out union membership applications during their lunch period or distributing union circulars on their own time in a company parking lot, and the Court held such activities protected.[53] The Court has recently stated this rationale explicitly:

"No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can

[48] *Southern Steamship Company v. NLRB*, 5 LABOR CASES ¶ 51,139, 316 U. S. 31 (1942).

[49] *NLRB v. Local Union No. 1229, IBEW*, 24 LABOR CASES ¶ 68,000, 346 U. S. 464 (1953), at p. 477, note 13.

[50] For an extensive discussion of this case, see *Patterson-Sargent Company*, 115 NLRB 1627 (1956), and Lipton, "Misconduct in Concerted Activities Under the NLRA," 8 *Labor Law Journal* 299 (May, 1957).

[51] 94 NLRB 1507, 1511.

[52] Cited at footnote 49, at pp. 472, 476.

[53] *Republic Aviation Corporation v. NLRB*, 9 LABOR CASES ¶ 51,199, 324 U. S. 793 (1945).

I think we have more machinery of government than is necessary, too many parasites living on the labor of the industrious.—Jefferson, in a letter to William Ludlow.

demonstrate that a restriction is necessary to maintain production or discipline."[54]

This rule leaves open the extent of the restrictions which may be placed upon the employees' right to discuss organization with nonemployee organizers on their own time but on company property. Here the Court has found that the employer's right to the use of its facilities outweighs the employees' right to outside information concerning unionism "when the usual methods of imparting such information are 'readily available'." Also here, on the other hand, the Court has said that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."

Thus, the employer cannot refuse to permit a union to rent the only meeting hall in a company town.[58] The perimeters of "usual methods of imparting information," "readily available" and "reasonable union efforts to communicate" remain for judicial determination.

The Court has yet to determine the balance among the employer's property rights, the employer's freedom to set forth his own noncoercive views on unionization, and the effect upon his simultaneous limitation of the employees' rights to use the same means he took for expressing his opinion. The Supreme Court has heard argument in two cases presenting various aspects of these interrelations. In the *Nutone* case,[56] the Board held that it was not a violation of the act for an employer to enforce a nondiscriminatory rule against distribution of literature in the plant against employees, even though he distributed his own literature in the plant. The United States Court of Appeals for the District of Columbia Circuit reversed the Board on the ground that the employer, by distributing literature, had destroyed the reason for the rule: his interest in avoiding littering in the plant. In the *Avondale* case,[57] the Board held that a no-solicitation rule was applied unlawfully when the employer discriminated against prounion oral solicitation while permitting coercive antiunion solicitation by supervisors. The Court of Appeals for the Fifth Circuit held that there was no substantial evidence that the rule had been discriminatorily invoked or applied. It is the Board's view that the employer's proprietary interests are paramount when all normal channels for the distribution of literature continue to be available to the employees but that an infringement on the right to solicit for the union must be justified by some substantial countervailing employer interest in plant efficiency and discipline.

Bargaining Process

Although a primary purpose of the act is "encouraging the practice and procedure of collective bargaining," the Supreme Court has passed upon relatively few questions relating to the collective bargaining process. It has considered the circumstances establishing that the employer must deal with a union claiming to be the representative of a majority of its employees in an appropriate unit,[58] the adequacy of a request for bargaining[59] and the duration of the duty to recognize a certified union as majority representative.[60] Under the Railway Labor Act and the Wagner Act,[61] the Court out-

[54] *NLRB v. Babcock & Wilcox Company, et al.*, 30 LABOR CASES ¶ 69,911, 351 U. S. 105 (1956).

[55] *NLRB v. Stowe Spinning Company*, 16 LABOR CASES ¶ 64,991, 336 U. S. 226 (1949).

[56] *United Steelworkers of America, CIO, and Nutone, Inc. v. NLRB*, 31 LABOR CASES ¶ 70,329, 243 F. (2d) 593 (CA D. of C., 1956), cert. granted, 353 U. S. 921.

[57] *NLRB v. Avondale Mills*, 32 LABOR CASES ¶ 70,589, 242 F. (2d) 669 (CA-5, 1957), cert. granted, 355 U. S. 811.

[58] *Brooks v. NLRB*, 27 LABOR CASES ¶ 68,835, 348 U. S. 96 (1954), setting forth "working rules" thereon.

[59] The duty to bargain does not arise until an adequate request has been made. A request to bargain relayed through a "third person without apparent authority" to represent the employees is insufficient (*NLRB v. Columbian Enameling and Stamping Company, Inc.*, 1 LABOR CASES ¶ 17,043, 306 U. S. 292, 297-298 (1939).

[60] *Brooks v. NLRB*, cited at footnote 58.

[61] *H. J. Heinz Company v. NLRB*, 3 LABOR CASES ¶ 51,107, 311 U. S. 514 (1941); *Virginian Railway Company v. System Federation No. 40, et al.*, 1 LABOR CASES ¶ 17,022, 300 U. S. 515, 548; and see *Order of Railroad Telegraphers v. Railway Express Agency*, 8 LABOR CASES ¶ 51,174, 321 U. S. 342, 346. Although the statutory standards and duties are somewhat different, the Court has consistently relied upon decisions under either act in explicating the other. See *Order of Railroad Telegraphers v. Railway Express Agency* and *NLRB v. Jones & Laughlin Steel Corporation*, cited at footnote 10, at pp. 41-46.

The UAW, like most major unions, has a history of opposition to conventional profit-sharing. An April 1949 issue of the UAW publication, *Ammunition*, vigorously attacked profit-sharing as an anti-union weapon of employers and "a step backward."—Chamber of Commerce of the United States.

lined the duty to bargain, essentially in the terms ultimately incorporated in Section 8(d) of the Taft-Hartley Act: ". . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

The Board has interpreted "other terms and conditions of employment" as requiring bargaining on such fringe-benefit matters as group insurance, company-owned housing, merit pay, wage incentives, pensions and retirement, arbitration, disciplinary matters, seniority, price of meals, work loads and standards, shop rules, work schedules, and stock-purchase plans. The Court has passed on few of these. It has upheld the duty to bargain on discharge actions[62] and on retirement and pension plans[63] but refused to rule upon stock-purchase plans as a subject requiring bargaining[64] and has never passed upon group health or accident insurance and other subjects. The Court has yet to decide the limits to be placed upon "other terms and conditions of employment."

The Board has assumed that Section 8(d) creates "a duty to bargain over the interpretation of clauses of a collective bargaining contract the meaning of which is in dispute" but that there is no duty to discuss or agree to modification in a contract to become effective prior to the time fixed in the contract for reopening those terms and conditions.[65] In dicta in the *Sands* case the Court went further:[66] ". . . we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning."

But the Court has not yet passed directly upon the question of any continuing duty to bargain during the term of a contract or the scope of such duty.

The Court has yet to develop any guide to "good faith" during negotiations. One current problem is the extent to which positions taken in the bargaining must be supported by reasons and data substantiating the reason. The *Truitt* case posed the long-debated question of whether an employer claiming financial inability to make a wage increase must back up the claim by offering evidence of its financial condition to the employees' representative. The Court said:

"We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages *may* support a finding of a failure to bargain in good faith."[67]

The Court did not adopt a per-se rule, and cautioned:

"We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met."

The Court must still furnish a guide for determining "the circumstances" to be considered in requiring data.

Part of the difficulty in determining what constitutes good faith arises from the fact that the statutory scheme recognizes the possibility of the parties' reaching an impasse. Neither is required to agree to a proposal nor to make a concession. This problem underlies the Supreme Court's decision in *American National Insurance Company*. The decision is still to be clarified. That case involved the question of whether an employer could adamantly insist upon a

[62] *National Licorice Company v. NLRB*, 2 LABOR CASES ¶ 17,056, 309 U. S. 350 (1940).
[63] *Inland Steel Company v. NLRB*, 336 U. S. 960 (1949).
[64] *Richfield Oil Corporation v. NLRB*, 29 LABOR CASES ¶ 69,690, 231 F. (2d) 717 (enf'g 110 NLRB 356), cert. den., 351 U. S. 909.
[65] *Jacobs Manufacturing Company*, 94 NLRB 1214 (1951), enf'd, 21 LABOR CASES ¶ 66,949, 196 F. (2d) 680 (CA-2, 1952).
[66] *NLRB v. Sands Manufacturing Company*, 1 LABOR CASES ¶ 17,044, 306 U. S. 332, 342 (1939).
[67] *NLRB v. Truitt Manufacturing Company*, 30 LABOR CASES ¶ 69,932, 351 U. S. 149 (1956).

"management prerogatives" clause which gave management final say on such matters as promotions, work schedules and demotions, discharges and disciplinary actions for cause. The clause was a counterproposal to the union's demand for arbitration of these and other matters. Upholding a reversal of the Board's finding of refusal to bargain, the Court said:

". . . we reject the Board's holding that bargaining for the management functions' clause proposed by respondent was, *per se*, an unfair labor practice. . . . The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions' clauses altogether." [68]

This statement implies that *some* management prerogatives clause proposals *may* evidence bad faith. The Court has supplied no criteria. The Court also observed that under Section 8(d):

"It is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

We cannot assume that the Court, in this statement, held that the Board lacks authority to premise any finding of a refusal to bargain in good faith on the substantive terms upon which consent to any agreement was conditioned.

The question whether an employer may insist that the contract provide for strike ballot and employee vote on any last offer of the employer is currently before the Court in the *Borg-Warner* case.[69] In that case, the company insisted, as a condition of making any agreement, upon a clause in which the union agreed not to call a strike or to reject any last offer of the employer unless such action was approved by majority vote in a secret ballot election among all employees in the unit. The Board distinguished the strike-ballot provision from the traditional no-strike clause on the ground that, where a union grants a no-strike clause as a return for some *quid pro quo*, it does not surrender its statutory right to speak with finality on behalf of employees. The Board held this clause to be in derogation of the union's status as the certified bargaining representative of the employees and outside the statutory area of bargaining. The Court of Appeals for the Sixth Circuit disagreed, and the Board sought review. The decision of the Court should be a significant landmark in the law clarifying "the statutory area of bargaining."

If the wage and price instability that is prevented by rigid wage rates becomes instead instability of production and employment, the resulting inconvenience and hardship to labor, as well as to others, will be increased and prolonged.
—The Guaranty Survey

Presumably there are limits to the proposals upon which either party may condition any contract without manifesting bad faith. The question remains whether these limits are to be found only in the insistence upon illegal provisions or whether they may be found in the insistence upon provisions outside the range of mandatory subjects for bargaining which impair statutory or other rights or status of the other party.

The proviso to Section 8(d) requires that a contract be continued in full force and effect, without resort to strike or lockout for 60 days after notice of desire to terminate or modify the contract, and subjects strikers to possible loss of status as employees. One of the questions presented for determination was whether any accommodation could be made for strikes provoked by unfair labor practices. In *Mastro Plastics Corporation*, the Court held that the notice requirement does not apply to a strike caused solely by an employer's unfair labor practices.[70] In that case, the Court also concluded that a no-strike clause of the contract did not extend to such strikes. Another problem was how to apply the notice requirements to strikes for economic reasons during the contract term—a subject on which many diverse views have been advanced over the years. In the *Lion Oil* case, the Court affirmed the Board's reading of the statute as permitting economic strikes

[68] 21 LABOR CASES ¶ 66,980, 343 U. S. 395, 408.
[69] *NLRB v. Borg-Warner Corporation*, 31 LABOR CASES ¶ 70,210, 236 F. (2d) 898 (CA-6, 1956), cert. granted, 353 U. S. 907.
[70] *Mastro Plastics Corporation v. NLRB*, 29 LABOR CASES ¶ 69,779, 350 U. S. 270 (1956).

after 60 days' notice preceding a date on which the contract, by its terms, could properly be reopened for modification.[71]

Other cases involved Section 8(d) less directly. The lockout as an employer means of self-help in maintaining a multiemployer bargaining unit was before the Court in the *Buffalo Linen Supply Company* case.[72] The Court specifically reserved the question of the limits of the legitimate use of the lockout and dealt with it only "as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." In approving such lockout, the Court noted the conflict that may arise between the employees' right to strike and the interest of an employer in preserving group bargaining for reasons of bargaining strength and uniformity of competitive position. It declared that "the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from disintegration threatened by the Union's strike action was lawful."

The end result of the bargaining process is usually agreement or a strike. However, there are many varieties of economic pressures made use of in the economic tug of war going on at the bargaining table (or spreading into other areas), the legitimacy of which have not yet been determined by the Court. Problems involving intermittent work stoppages or slowdown damaging to production schedules (the "hit and run" or "spot strike" in the telephone industry, etc.) are still to come before the Court. The fact is that the Court did have the question of slowdowns before it in the *Personal Products* case (*Textile Workers Union of America, et al.*, 108 NLRB 743). In that case the Board distinguished the Court's ruling in *UAW, Local 232 v. WERB*, 16 LABOR CASES ¶ 64,992, 336 U. S. 245, 253, which, in effect, held that slowdowns were neither protected nor prohibited by the act and could be enjoined by the Wisconsin state court. In *Personal Products*, the Board held that the slowdowns were evidence of bad-faith bargaining. The Court of Appeals for the District of Columbia (29 LABOR CASES ¶ 69,515, 227 F. (2d) 409) reversed the Board's decision in *Personal Products*, and the Board petitioned for and was granted certiorari (350 U. S. 1044). Subsequently, the Supreme Court vacated its grant of certiorari and dismissed the Board's petition without comment (352 U. S. 864). However, because of the absence of a reason or comment by the Court, we cannot infer that in a similar situation the Court will not decide the vexatious question of slowdowns. It is the extent of such permissible economic conflict that the Supreme Court has yet to delimit—that is, it has yet to decide what economic weapons are legitimate and what are "beyond the pale." It must eventually tell us where the social gain from permissible economic conflict is overbalanced by the social evil resulting therefrom in an increasingly interdependent society.

Contract

There have been even fewer cases considering any aspect of the collective bargaining contract than those dealing with the collective bargaining process. The early cases dealt with the impact of contracts with individual employees upon the duty of an employer to bargain collectively with their representative. The Court held that the collective bargaining agreement supersedes individual contracts and that such contracts cannot bar collective bargaining.[73] It has also held that an employer may with impunity insist upon adherence to unambiguous contract provisions, both by the union and individual employees.[74]

It has yet to consider in detail the relationships among (1) contract terms, (2) those provisions of the Taft-Hartley Act which are manifestly designed to regulate the contents of collective bargaining agreements, for example, the limitation on union-security provisions, checkoff clauses, termination or reopening clauses, and welfare plans and (3) other provisions of Section 8(a) and (b) of the Act. It has yet to consider the extent to which an illegal provision in a contract may warrant the Board's setting the contract aside.

The Court decision in *Rockaway News* raises some of these questions, without suggesting their ultimate resolution. In that case, an employee who refused to go through the picket line of a union other

[71] *NLRB v. Lion Oil Company*, 31 LABOR CASES ¶ 70,446, 352 U. S. 282 (1957).

[72] *NLRB v. Truck Drivers Local 449, Teamsters*, 32 LABOR CASES ¶ 70,593, 353 U. S. 87 (1957).

[73] *J. I. Case Company v. NLRB*, 8 LABOR CASES ¶ 51,173, 321 U. S. 332 (1944); *Medo Photo Supply Corporation v. NLRB*, 8 LABOR CASES ¶ 51,176, 321 U. S. 678 (1944); *National Licorice Company v. NLRB*, cited at footnote 62.

[74] *NLRB v. Sands Manufacturing Company*, cited at footnote 66; *NLRB v. Rockaway News Supply Company, Inc.*, 23 LABOR CASES ¶ 67,440, 345 U. S. 71 (1953).

than his own to make deliveries at the premises of a customer was discharged pursuant to the no-strike provision in the collective bargaining agreement. The discharge was sustained in an arbitration award based upon the arbitration clause in the contract. The Board found the contract invalid because it contained an illegal union-security provision and the Board, therefore, gave no effect to the no-strike clause or the arbitration provision or award. Finding the employee's conduct protected under the proviso in Section 8(b)(4)(d), the Board ordered him reinstated. The Court held that the contract governed the relation between the employer and employee, and that his breach of such an agreement was grounds for his discharge and not a violation of the act. Referring to the Board's basis for decision, the Court said:

"We do not, of course, question that there may be cases where a forbidden provision is so basic to the whole scheme of a contract and so interwoven with all of its terms that it must stand or fall as an entirety. But the Board here simply held that the provision concerning union security invalidates the whole contract, as the examiner said, 'because it does not *expressly* provide that the operation of the union-security provision was to be conditioned upon compliance with the provisions of Section 9(3) of the Act'. (Italics supplied.) . . . The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine. It rests upon no decision of this or any other controlling judicial authority." [75]

The Court also said (at page 77):

"It is ironical that respondent has been denied the result of the arbitration by the Board solely because the respondent, by the contract, conceded too much to union security, allowing the union what the Taft-Hartley Act does not permit. If respondent pursued any wrong course in dealing with Waugh, it evidently was not due to hostility to labor organizations."

Section 301(a) of the Taft-Hartley Act authorizes suits by and against labor organizations for breach of the collective bargaining agreement. This provision has led the Court to consider at length the legal relations created by a collective bargaining agreement. This is a subject with which courts have long struggled. It has been called a "collective bargaining contract" and a "labor-trade agreement," and likened to a "charter," to a "schedule of tariffs" for carriers or utilities, and to standard provisions prescribed for insurance contracts.[76] It has been viewed as a third-party beneficiary contract. Some courts have accorded it no status.[77]

The most common view of the situation of an employee working in a bargaining unit covered by a collective bargaining agreement is that there are two contracts: [78] the union agreement and the individual employee's contract of employment which incorporates the relevant terms of the union's agreement with the employer.

There have been two Court decisions under Section 301(a). In the *Westinghouse* case,[79] the Court held that the federal courts do not have jurisdiction to entertain a union's suit for employees' claim for back pay under the contract. Apparently, the union may not serve in a representative capacity in bringing suit under Section 301(a) to enforce contract obligations which involve obligations running to the employees individually. In the recent *Lincoln Mills* case,[80] the Court held that a union may obtain in a federal court specific performance of an agreement to arbitrate. The courts were instructed to fashion a law appropriate to the subject. Although this would seem to be an obligation belonging to the union, the Court specifically reserved the question of the rights of employees to compel arbitration. This reservation raises, as did the rationale in the *Westinghouse* case, the question as to which provisions in a collective bargaining contract create duties toward the union as opposed to employees and it opens many questions concerning the rights of the individual employees. The grant of specific performance for arbitration provisions raises the question of the weight to be accorded such awards by the Board, especially those

[75] Cited at footnote 74, at p. 80.

[76] *J. I. Case Company v. NLRB*, cited at footnote 73, at p. 335.

[77] For a discussion of various views, see *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 24 LABOR CASES ¶ 68,108, 210 F. (2d) 623 (CA-3, 1954), aff'd, 27 LABOR CASES ¶ 69,063, 348 U. S. 437 (1955).

[78] Case cited at footnote 77. For a discussion of the still-unsolved problems of the group agreement, see Cox, "Law and the Future: Labor Management Relations," 51 *Northwestern University Law Review* 251 (1956).

[79] Cited at footnote 77.

[80] *Textile Workers Union v. Lincoln Mills*, 32 LABOR CASES ¶ 70,733, decided June 3, 1957.

awards which involve rights protected by the act.

Union Unfair Labor Practices

Since the 1947 amendments first placed restrictions upon certain union conduct as unfair practices, the Court has reviewed seven cases involving these sections. The first four cases dealt with the ban against secondary boycotts.[81] The next two dealt with the ban against featherbedding.[82] The last dealt with the section which forbids a union to cause or attempt to cause illegal discrimination against employees.[83]

Three of the secondary boycott cases arose in the construction industry. The Board's jurisdiction in each was contested on the ground that only local construction was involved; in each the Court found that the effect upon interstate commerce was sufficient for assertion of Board jurisdiction. A major contention in two cases was that peaceful picketing to induce employees of a secondary employer to stop work came within the protection of Section 8(c) of the act, the "free speech" section. The court rejected this contention, declaring:

"To exempt peaceful picketing from the condemnation of 8(b)(4)(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion."

In the *Rice Milling* case, the Court upheld the Board's view that a union seeking recognition at a plant did not violate the secondary boycott ban when its pickets at the plant gate persuaded the truck-driver of a customer of the plant to turn back. The Court here declared that, in such picketing, the union's inducement of employees of neutral employers approaching the picketed place "generally [is] not aimed at concerted, as distinguished from individual, conduct by such employees." Distinguishing the *Rice Milling* decision in the *Denver* case, the Court said:

"There the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill." [84]

It would appear now that the next question before the Court in this area will be the validity and effect of the so-called "hot cargo" clauses in view of the conflict of opinion which has developed between the Courts of Appeal for the District of Columbia and the Second Circuit, on the one hand, and the Ninth Circuit, on the other hand.[85] The union in the Ninth Circuit case has filed a petition for certiorari and the Board recently decided not to oppose it. A majority of the Board, while divided on the question of the legality of making such a contract, is agreed that the union cannot enforce the clause by direct appeals to the employees of the secondary employer. The District of Columbia and the Second Circuit Courts of Appeal held that such a clause permitted direct appeals to the secondary employer's employees by the contracting union.

No more vexatious question has existed since the 1947 amendments converted Wagner into Taft-Hartley than the legality or illegality of "hot cargo" clauses and conduct pursuant thereto. I have not yet had occasion to write on this matter, so I am merely recording my observations as to what my predecessors, colleagues, and the courts have done.[86]

For ten years the NLRB has been divided into three fragmentary views. For ten years no clear majority rationale has emerged on this subject, but rather separate concurrences, dissents and theories have been

[81] *NLRB v. Denver Building & Construction Trades Council (Gould & Preisner)*, 19 LABOR CASES ¶ 66,347, 341 U. S. 675 (1951); *IBEW, Local 501 v. NLRB*, cited at footnote 22; *NLRB v. Local 74, United Brotherhood of Carpenters & Joiners*, cited at footnote 23; *NLRB v. International Rice Milling Company*, 19 LABOR CASES ¶ 66,346, 341 U. S. 665 (1951).

[82] *American Newspaper Publishers Association v. NLRB*, 23 LABOR CASES ¶ 67,436, 345 U. S. 100 (1953); *NLRB v. Gamble Enterprises, Inc.*, 23 LABOR CASES ¶ 67,437, 345 U. S. 117 (1953).

[83] *CTU, Radio Officers' Union v. NLRB*, 25 LABOR CASES ¶ 68,111, 347 U. S. 17 (1954).

[84] Cited at footnote 81, at pp. 687-688.

[85] *NLRB v. Local 1976, Carpenters Union (Sand Door & Plywood Company)*, 113 NLRB 1210, enf'd, 31 LABOR CASES ¶ 70,504, 241 F. (2d) 147 (CA-9, 1957); *General Drivers Union [IBT], Local 886 v. NLRB (American Iron & Machine Works Company)*, 115 NLRB 800, enforcement den. in part, 32 LABOR CASES ¶ 70,689 (CA D. of C., 1957); *Milk Drivers & Dairy Employees Local 338, IBT v. NLRB*, 32 LABOR CASES ¶ 70,777 (CA-2), decided June 19, 1957 (Crowley's Milk Company).

[86] See my opinion in *Truck Drivers, Local 728 (Genuine Parts Company)*, 5 CCH Labor Law Reports (4th Ed.), ¶ 54,979, 119 NLRB, No. 53.

so intermingled and intertwined in the decisions that no lawyer or court—in my opinion—could, without great difficulty, ascertain precisely what they mean. With each change in the membership of the Board, a different view has emerged. While the question of federal and state jurisdiction presents a dilemma to the practicing lawyer of relatively recent origin, the "hot cargo" problem is one we have all lived with and not yet solved. Many courts have been divided on the question.[87] Fortunately or unfortunately, depending on your point of view, the Supreme Court will now have a chance to give us guidance.

So far there have been 110 decisions of the Supreme Court of the United States which reviewed NLRB decisions.

The current Supreme Court docket contains cases presenting other problems. One involves the Board's authority to delegate to hearing officers authority to pass upon petitions to revoke subpoenas requiring the production of evidence and the authority of a district court to rule upon enforcement of subpoenas where the petition to revoke had been heard and denied by the hearing officer, and no appeal had been taken to the Board. The problem arose from a conflict of circuits.[88]

Probably, the most persistent issue before the Court has been the jurisdiction of the Board. It has been at issue in many cases since the famous five of April 12, 1937—most recently in the *Guss* cases ousting the states of jurisdiction over labor disputes affecting interstate commerce in the absence of a cession agreement[89] and the *Office Employees* case holding that the Board has no authority to refuse to assert jurisdiction over labor organizations "when acting as an employer."[90] In these cases, the Court carefully reserved the question of "the validity of *any* particular declination of jurisdiction by the Board or *any set* of jurisdictional standards." (Italics supplied.)[91]

Next fall the Court will hear argument in *Hotel Employees, Local 255 v. Leedom*.[92] In that case, the Court of Appeals for the District of Columbia Circuit affirmed, without opinion, a summary judgment which upheld the authority of the Board to decline, as a matter of policy, to exercise jurisdiction in representation cases involving the hotel industry outside the District of Columbia. The grant of certiorari means that the Court may clarify the standards which the Board may in its discretion employ and the methods it must use in promulgating standards for the assertion of jurisdiction. There will be other questions.

I have tried to outline broadly the exciting story of the past 22 years in what I consider the most dynamic and far-reaching field of law in modern society. The story has just begun. **[The End]**

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[87] *Rabouin, d.b.a. Conway's Express*, 87 NLRB 972, 982, review den., 21 LABOR CASES ¶ 66,836, 195 F. (2d) 906, 912 (CA-2, 1952); *General Drivers Union [IBT], Local 886 v. NLRB (American Iron & Machine Works Company)*, cited at footnote 85; *Madden v. Local 442, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 24 LABOR CASES ¶ 67,857, 114 F. Supp. 932 *(contra)*; *NLRB v. Local 1976, Carpenters Union*, cited at footnote 85; *Douds v. Milk Drivers and Dairy Employees Local 680 [IBT]*, 28 LABOR CASES ¶ 69,379, 133 F. Supp. 336, 341-342 (DC N. J., 1955) (dictum); *Alpert v. United Brotherhood of Carpenters and Joiners of America*, 143 F. Supp. 371 (DC Mass., 1956), noted, 70 *Harvard Law Review* 735 (1957); note, "Hot Cargo Clauses as Defenses to Violations of Section 8(b)(4)(A) of the LMRA," 64 *Yale Law Journal* 1201 (1955); cf. *NLRB v. Local 11, United Brotherhood of Carpenters & Joiners of America*, 32 LABOR CASES ¶ 70,631, 242 F. (2d) 932; *Milk Drivers and Dairy Employees Local 338, IBT v. NLRB*, cited at footnote 85.

[88] *NLRB v. Duval Jewelry Company of Miami, Inc.*, 32 LABOR CASES ¶ 70,603, 243 F. (2d) 427 (CA-5, 1957), cert. granted, 355 U. S. 809, holding that the Board lacked authority to make such delegation and finding without merit its contention that the parties whose petitions for revocation had been denied had failed to exhaust their administrative remedies by failing to appeal from the hearing officer's denial; *Lewis, d.b.a. California Footwear Company v. NLRB*, 32 LABOR CASES ¶ 70,834, 246 F. (2d) 886 (CA-9, 1957), cert. granted, 355 U. S. 929, sustaining the Board's authority to make the delegation.

[89] To list only those in which the Board was a party litigant: *Santa Cruz Fruit Packing Company v. NLRB*, 1 LABOR CASES ¶ 17,031, 303 U. S. 453 (1938); *Consolidated Edison Company v. NLRB*, 1 LABOR CASES ¶ 17,038, 305 U. S. 197 (1938); *NLRB v. Fainblatt*, 1 LABOR CASES ¶ 17,045, 306 U. S. 601 (1939); *NLRB v. Bradford Dyeing Association*, 2 LABOR CASES ¶ 17,062, 310 U. S. 318 (1940); *Polish National Alliance*, 8 LABOR CASES ¶ 51,182, 322 U. S. 643 (1944); *Denver Building & Construction Trades Council (Gould & Preisner)*, cited at footnote 81; *IBEW Local 501 v. NLRB*, cited at footnote 22; *NLRB v. Local 74, United Brotherhood of Carpenters & Joiners*, cited at footnote 23; *Howell Chevrolet Company v. NLRB*, 24 LABOR CASES ¶ 68,019, 346 U. S. 482 (1953); *NLRB v. Bill Daniels, Inc.*, 347 U. S. 924 (1954); *Capital Service, Inc. v. NLRB*, 347 U. S. 501 (1954).

[90] *P. S. Guss v. Utah Labor Relations Board, Amalgamated Meat Cutters v. Fairlawn Meats, Inc.* and *San Diego Building Trades Council v. Garmon*, cited at footnote 31.

[91] *Office Employees International Union, Local 11 v. NLRB*, 32 LABOR CASES ¶ 70,675, 353 U. S. 313 (1957).

[92] *Hotel Employees Local 255, et al. v. Leedom*, 249 F. (2d) 506, (CA D. of C., 1957), cert. granted March 4, 1958.

Revolution in Industrial Employment

By RICHARD A. LESTER

The concept of employment will keep on changing, according to the author. He predicts that American industry, stimulated by union pressures and social advances, will provide new and enduring satisfactions for workers. This was a Sidney Hillman Foundation Lecture presented at the University of Wisconsin.

SINCE World War I, we in America have developed a new concept of employment in manufacturing firms of significant size. A special American pattern has evolved that adds noteworthy dimensions to the workshop relationship. Around employment has grown a network of employer obligations and employee rights that involve not only the dignity and welfare of the individual worker but also the security and well-being of the members of his family. In recent decades the nonwage aspects of employment, the so-called "fringe benefits," have been expanding much faster than has the basic wage. The consequence has been that in vast areas of American industry, the pre-World War I "commodity concept" of employment has been displaced by a post-World War II "welfare concept" of employer-employee relations.

This remarkable development has weighty implications for economic theory, for trade-union theory, for the operation of public employment services and unemployment compensation, and for the future of American capitalism. Yet, while much has been said about the "welfare state," surprisingly little attention and analysis have been devoted to the changing concept of industrial employment.

It will be the aim of my paper to explore some of the ramifications of this revolutionary alteration in one of our basic institutions. A paper dealing with the intellectual and practical consequences of institutional change may perhaps not be inappropriate at the university where John R. Commons made his great contribution and under sponsorship that honors Sidney Hillman, whose main aim in life was to improve the well-being of the working men and women of America.

Historical Background

For an examination of the metamorphosis of the employment relationship, some historical perspective may be helpful.

An intriguing aspect of the history of knowledge concerns the question of why certain concepts and doctrines, now so evidently inadequate or erroneous, once held indisputable sway over men's minds. Why, for instance, did economists unquestioningly accept for 50 years, until John Stuart Mill exploded it as a myth in 1869, the strange and almost incomprehensible wage-fund theory—that employers somehow have an annual fixed fund unqualifiedly dedicated to wage payments? Part of the answer appears to lie in man's proclivity to harbor comforting doctrines and his reluctance to abandon intellectual frameworks acquired as a student.

We are all more or less slaves to our youthful thought-patterns. Our minds, yes, our lives, are practically governed by theories —by those simplified systems of thought that seem to enable us to make sense out of a complex world. Of course, abstract theory never exactly explains reality, but it is sufficiently effective if it embodies principles or truths that illuminate obscurity and lead to approximately valid conclusions.

The history of a discipline like economics is the story of the evolution and alterations in its concepts and theories—the elaboration, modification and abandonment of the great

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ideas of the masters. Some of the older theories may require little, if any, adjustment to fit the present-day institutional structure of American society. Others, however, have been rendered more or less obsolete by modern social changes so that now they, like the bones of prehistoric animals, have chiefly an antiquarian interest. The wage-fund theory belongs in this relic category.

One of the most potent concepts in economics is that of the market. In abstract, the market is the place where the forces of demand and supply converge to establish exchange of a commodity at a price or succession of prices. Much of economic theory rests on this concept.

It is not surprising, therefore, that market logic was applied early to the purchase and sale of labor services. True, the textbooks use goods and not labor to illustrate the operation of market forces, and while economists often refer to the "labor market," no one apparently has ever attempted a careful theoretical formulation of a market for labor in which the wage rate freely fluctuates to equate demand and supply. Although it is difficult even to envision a free, competitive market for labor with a completely flexible wage to maintain equilibrium of demand and supply, nevertheless past conditions have been sufficiently close to the competitive ideal to make answers based on such reasoning approximately correct.

Until World War I, labor in practice, as in classical theory, was viewed by corporate management almost in commodity terms. Its purchase and sale were generally on a short-term basis. Firms assumed few, if any, continuing obligations to employees; the cash nexus was practically the only tie. Social Darwinism and competitive pressures were used to justify callous treatment. As some of you may recall, Karl Marx, in the *Communist Manifesto,* asserts that under capitalism workers are "a commodity, like any other article of commerce, and are consequently exposed to all the vicissitudes of competition, to all the fluctuations of the market."[1] That characterization of factory employment a century ago was evidently warranted.

Early in this century, the commodity concept of employment still predominated. It is revealed, for example, in the philosophy of "scientific management" as well as in the attitudes of American management, particularly in larger firms. In his writings, Frederick W. Taylor, father of the "scientific" study of work, practically considers employees to be machines, ignoring the significant role of psychological and social factors. Commenting on management's attitude toward employees before World War I, when he was almost killed by an industrial accident, Cyrus Ching writes:

"The average employer regarded his employees, particularly in the lower ranks, with a sort of calloused indifference to their plight which today defies comprehension. This was especially true of the larger companies. . . . The worker was looked upon as just part of the machinery which kept the company operating and he was treated like that. If he were injured or totally incapacitated, even in line of duty, he was cast aside and replaced like a broken piece of equipment. . . . And rare was the employer who gave a tinker's dam what happened to him."[2] In Ching's own case, he was off the company's payroll the minute news reached company headquarters that he had been nearly electrocuted on his job, and no one from the company even got in touch with him during the subsequent four months that he spent in the hospital.

[1] *Communist Manifesto* (with an introduction by Harold J. Laski) (1948), p. 128.

[2] *Review and Reflection* (1953), pp. 5-6.

In many large firms, employment was still a short-run business transaction as late as the 1920's. In the automobile industry, for instance, it was the custom for Ford and the other manufacturers, when changing a model, to pay every worker off and close down the plant. When it was reopened, all the hourly workers were rehired as new employees at the beginner's rate regardless of the length of past employment with the company.[3]

Welfare Concept

Many factors have contributed to the transformation from a commodity to a welfare concept of employment during the past two decades. The relative shortage of labor under full employment has been one factor. Another has been the change in the composition of the nation's labor force with the sharp curtailment of immigration and advances in the level of education of factory workers. With the increase in capital investment per employee in American industry, employee responsibility and on-the-job training have grown. These factors have helped to extend the employment horizon of managements, inducing them to think more in terms of a company's investment in work force and of work-life attachment of employees to the firm.[4]

Other developments have also aided in shifting some emphasis from workers' gratification through money earnings to on-the-job satisfactions and security for themselves and their families. Advances in psychology and sociology have indicated that nonfinancial considerations are important in worker contentment, and that in a free economy based on willing cooperation, treatment of employees with respect and winning their loyalty can pay off in company profits. As American capitalism has matured, greater recognition has been given to the professional qualifications of business management and to the corporation's community responsibilities. Former New Dealers like David Lilienthal and Adolph Berle have stressed the social obligations that big business accepts in mid-twentieth century.[5]

The rapid spread of labor organization in the 1930's shocked American management into enlargement of its employee programs and activities. The consequence was much greater stress on personnel programs and human relations—employee counseling and communications, foreman training, programs of induction and economic education, company aid for employees in college courses, attitude surveys, employee consultation and suggestion systems, and benefit and recreational programs of all kinds. Instead of merely a means for wage employment, companies took on many aspects of a community center, a school, a medical and psychiatric clinic, a polling and magazine office, and an insurance company—all in the name of good employee relations.

Unions have, of course, played a significant role in the eclipse of the commodity concept of employment. This they have done by expanding the scope of bargaining and adding new dimensions to the employment concept. Part of this expansion has taken the form of new rights and protections. These include the concept of probationary and nonprobationary employees; seniority rights in layoff, transfer and promotion; grievance procedure protections, usually with ultimate appeal to outside arbitration; and the many "working rules" concerning hours, overtime and other plant practices. The protections range from hospital and medical care, and sickness and disability pay, to dismissal compensation, supplemental unemployment compensation, group life insurance and retirement pensions. Items like hospital and medical care usually cover not only the employee himself but also all his dependents. They may cover pensioners and their dependents too, and unions negotiate to improve the company pensions of employees long after they have retired from the firm. In other words, the company obligation does not stop when the worker retires; it extends for a more indefinite period and may include periodic improvements in retirees' benefits. Thus have unions stretched the employer relationship to a family welfare obligation on the part of the employer.

In addition, the continuing nature of the employee tie is emphasized by long-term agreements which preordain pay scales for two, three, four and five years into the future, regardless of changing conditions of labor demand and supply. Making wages subject to automatic increases under long-term contracts moves labor farther away from a commodity concept and the immediate influence of short-run market forces.

[3] Harry Bennett, *We Never Called Him Henry* (1951), pp. 108-109.

[4] For an extended analysis of this point based on an empirical study, see Richard A. Lester, *Hiring Practices and Labor Competition* (Industrial Relations Section, Princeton University, 1954).

[5] David E. Lilienthal, *Big Business: A New Era* (1952); and Adolph A. Berle, Jr., *The Twentieth Century Capitalist Revolution* (1954).

The significance of these developments is brought home by a few figures. The coverage of private employee-benefit plans at the end of 1954 is estimated as follows: hospitalization, 76 million employees and their dependents; surgical, 67 million; medical, 39 million; life insurance and death benefits, 31 million; temporary disability, 23 million; and retirement, 13 million. Some two fifths of the welfare coverage and three fifths of the retirement coverage, along with 3 million now under supplemental unemployment compensation, were included under plans in collective bargaining agreements.[6] During the past two decades, supplemental compensation, consisting mainly of benefit programs, has increased much more rapidly than wages. For example, nonwage compensation is estimated to have risen from 6 per cent of labor cost in this country in 1938 to 14 per cent in 1951.[7] Another survey indicates that while hourly earnings in American industry rose 54 per cent in the decade from 1947 to 1957, fringe benefits rose by some 133 per cent.[8] This trend seems likely to continue, as does also the practice of long-term labor agreements with automatic wage increases, which in 1957 covered about 5 million plant workers.

Collective bargaining in England, Sweden and most other countries does not customarily provide for automatic wage increases from year to year, for employee benefits, for layoffs and promotion opportunities according to seniority, or for other institutional attachments of employees to individual firms. Abroad, collective bargaining is generally confined, for the most part, to wages, hours and (to a lesser extent) working conditions. Labor agreements in countries like England and Sweden are, therefore, only a fraction of the size or the scope of agreements in this country. Also, the "human relations" program of business management both originated and has progressed further here than abroad. Consequently, the shift from a commodity to a welfare concept of employment has advanced much farther in America than in most other countries, although it has developed considerably by law in France and Italy, particularly in the form of family allowances.[9] Many aspects of this new concept are, thus, peculiarly American.

Undoubtedly the shift toward a welfare employment concept helps to account for the long-term decline in labor turnover rates in this country, especially the number of quits per 100 employees in manufacturing. With the proliferation of benefits and rights not transferable from company to company, workers are less prone to change jobs than they used to be. The quit rate, which prior to the 1950's was a good barometer of business conditions—high in prosperity and low in recession—no longer is such a good gauge of economic fluctuations because of a growing immobility in the American work force.

The figures are startling. Despite some inadequacies in the statistics, it is evident that the quit rate per 100 employees averaged about six per month for the five-year period before World War I. For the 1920's, the average was around three a month, and it fell to below one a month for the depression decade of the 1930's. In World War II it reached a peak of 4.6 for 1944 and 1945, which was less than half the figure for the peak years of World War I. In the 1950's, however, the quit rate has averaged less than two a month in spite of the unprecedented prosperity that has prevailed. In fact, the average quit rate was only 1.6 per month in the investment boom years of 1955 and 1956.[10] The statistics certainly mirror a remarkable change in labor mobility—a drop from six a month before World War I to three a month for the 1920's, to an average of 1.8 for the 1950's.

These combined developments have resulted in a significant evolution, if not mutation, in the nature of industrial employment. However, it is characteristic of our intellectual lag that while practice has traveled great distances, theory has been asleep. The awakening of theory and helping it to catch up is a theme to which we shall return after examination of changes in employee status that are also a part of the great transformation in the nature of industrial employment.

Employee Status

A part of the aim of labor unions has been to eliminate differences in employment rights and privileges between blue-collar and white-collar employees. Put in another

[6] Joseph Zisman, "Private Employee Benefit Plans Today," *Social Security Bulletin*, January, 1957, p. 11.

[7] Estimates by Melvin Rothbaum in G. W. Taylor and F. C. Pierson, editors, *New Concepts in Wage Determination* (1957), p. 316. Mr. Rothbaum cautions that his estimates are "rough," based on a limited sample.

[8] Special report on "How Expensive Are 'Fringe Benefits'?" in *U. S. News & World Report*, October 12, 1956, pp. 97-100.

[9] See work cited at footnote 7, at pp. 316-317.

[10] The data in this paragraph are based on W. S. Woytinsky, *Three Aspects of Labor Dynamics* (1942), especially Ch. 3-5, and more recent figures from the *Monthly Labor Review*.

way, collective bargaining has been a vehicle for destroying elements in the inferior status of plant workers. To some extent, labor and social-security legislation has been used for the same purpose. Both bargaining and legislation have represented decisions by collective determination and community standards in contrast to individual action and market standards.

The relative elevation of blue-collar workers becomes evident when one examines four areas: (1) the spread of management privileges to plant employees, (2) the enhancement of workers' status through legislative action, (3) the compression of the income structure through reduction of differentials and (4) the participation of blue-collar workers in the solution of management problems and decisions.

Historically, displacement of the commodity concept has usually occurred first with respect to management personnel. For them the notion of company attachment and obligation generally develops early. Companies, seeking to increase loyalty, reward faithful service and accomplish other conscience-serving objectives, established for executives programs like profit sharing, stock ownership, pensions, paid vacations, disability and sickness pay, and discounts on company products. Gradually such privileges have spread down to the base of the employee pyramid, thus narrowing and eliminating distinctions between the unskilled worker and top management in these respects.

Legislative measures have also raised the dignity of the lowly worker and given him more status by removing him in part from buffeting by free competitive forces. Various social insurances—old age, unemployment, and sickness and disability—provide the worker with an income as a matter of right. He is not forced to sell his services currently in order to obtain a return. Other types of labor legislation also serve to distinguish the sale of labor from the sale of goods and equipment. Legal minimum wages, for example, represent the antimarket notion of a fair wage per se, below which it is improper to pay an able-bodied worker.

Not only have the advantages that supervisory and white-collar workers enjoyed in terms of "fringe benefits" been spread to blue-collar workers, but also their pay advantages have been narrowed. Opinion is divided on the significance of different factors in explaining the compression of wage and salary structures. However, improved living standards and advancing industrial maturity seem to be important elements, because the differentials in pay are wider in countries at earlier stages of industrial development. The leveling of pay scales that has occurred in most industrial countries during the past half century invites the formulation of a law of decreasing inequality of income with the advance in industrial growth.

The fourth of the areas in which factory workers have improved in relative status has been participation in management planning and activities. Under a commodity concept of employment, the separation of management and managed is sharp; under a welfare concept the distinctions are blurred. Management invites workers' suggestions, consultation and even participation. Of course, management usually retains the power to initiate action, refusing to be hampered by clauses in an agreement that would forestall a decision until it was "mutually acceptable." Nevertheless, acceptance plays such a significant role in a system based on voluntary cooperation that more concern for, and compromise with, worker viewpoints has developed in many firms. This is not the Webbs' "industrial democracy" or German "codetermination," but it does represent one form of improvement in the position of labor under American capitalism.

Stress on improvements in the relative status of the workingman does not imply that Sumner Slichter's "laboristic society" [11] has already arrived or is just around the corner. As yet, employees are not the most influential group in the community, dominating its culture, determining its values and controlling its public policies. Nevertheless, the distances and distinctions in industry between management and factory worker have been diminishing, and this trend toward more dignified treatment of the man at the bottom of the industrial hierarchy seems likely to continue.

Effect of Changes in Employment Concept

Now we are ready to examine some of the implications of these remarkable changes in the concept of industrial employment.

It is evident that expansion of the employment relationship far beyond mere price or money wage has great significance for

[11] Sumner H. Slichter, *The American Economy* (1948), pp. 7-10.

economic theory and especially wage theory. The addition of many new dimensions, including the welfare of employees' dependents and marked elongation of horizons, means that theoretical concepts must also be enlarged. Even the price aspects of employment take on new facets, not directly governed by demand and supply, under such influences as automatic adjustments under long-term agreements and notions of fair wages in the minds of legislators and union leaders.

Unless wage theory makes allowance for the revolutionary change that has occurred in the concept of employment in many leading American firms, it will prove far too inadequate as a tool of analysis for application to advanced industrial conditions. The more removed and out of touch with reality a theory becomes, the more it tends to be a relic, no matter how impressive its logic. A series of wage theories, beginning with the subsistence theory, have become outmoded by the march of events. A welfare concept of employment with work-life attachment to the firm differs from a commodity or labor-market concept as markedly as H-bomb warfare does from gunpowder combat. Under the newer, more advanced concept of employment, wage theory cannot be just a demand and supply analysis.[12] The new dimensions cannot be left out or squeezed into the old categories developed for price analysis; they are part of a bundle that is now far too big to be handled by the sausage machine of classical theory.

A new framework of analysis with enlarged concepts has become necessary if the analysis of wages and employment is not to be left floating in midair or even above the clouds. Of course, it is far easier to call for a new framework than it is to develop one. However, the first step is to recognize the need. If J. M. Keynes had not become acutely aware that changed reality required new theoretical emphases and concepts, our thinking might still be confined within the narrow channels of Say's law.

For trade-union theory the implications of a shift from a commodity to a welfare concept of employment are equally profound. Differences between blue- and white-collar workers in employment features and compensation have provided an important element in the dynamics of American unionism. Workers have pressed to reduce those differences, and on the basis of worker discontent, union leaders have endeavored to expand the scope of collective bargaining—to enlarge the terms of employment for manual workers and to narrow the gap between plant and office employees. In that way, the area of union interest, influence and functions has been expanding as the concept of employment has changed.

If we are going to implement public respect for the inherent rights of American workers and employers, whether those rights be moral or economic, our need is for a legal mechanism that will never allow fish to be made of one citizen and fowl to be made of the other.—Maurice R. Franks, president of the National Labor-Management Foundation.

Heretofore too little attention has been given to the role of employment concepts in the theory of union dynamics. Much union activity has consisted of pattern-making and pattern-spreading, of innovations and imitations, of "breakthroughs" and fanning out from beachheads. Enlargements in the scope of bargaining have, for the most part, represented enlargements in the concept of employment. The conquests that union leaders boast about include, in considerable measure, the new developments, the pioneering gains and the extraordinary enterprise. Among those that come readily to mind are seniority, grievance procedures ending in arbitration, noncontributory pensions, medical care, supplementary unemployment compensation and the new Reuther plan for profit sharing.

Not all unions, of course, are path-breakers. Many are forced by circumstances to be pattern-spreaders or followers. Rivalry between Walter Reuther of the United Auto Workers and David McDonald of the Steelworkers is more likely to generate innovations than, say, rivalry between the heads of the Textile Workers Union of America and the United Textile Workers. Nevertheless, unions are under pressure to make new conquests, and a significant part of the new gains is adding dimensions to, or altering elements in, the concept of employment.

An interesting area of speculation concerns the question of whether American

[12] For a contrary view see John T. Dunlop, "The Task of Contemporary Wage Theory," in *The Theory of Wage Determination* (1957), p. 14.

unions have been so successful in changing the concept of employment that they have reached a point of diminishing returns—whether they have already exploited the opportunities for expanding the concept of employment to such an extent that the outlets for innovation via collective bargaining have commenced to be significantly reduced. In the 1930's, there was much talk of economic maturity causing our economy to be less dynamic and more stagnant. Experience since World War II has dealt that stagnation thesis a severe blow. Is a theory of union maturity, postulating a secular decline in the outlets for union innovation, subject to much the same objections and shortcomings? Have American unions been so successful in narrowing the gap in employment terms between plant workers and managerial employees that their very achievements are reducing the opportunities for further union pioneering and, thus, beginning to affect the dynamic qualities of American unionism?

Surely there is need to re-examine trade-union theory in the light of the potential elasticity in the scope of bargaining and the long-run consequences of the elimination of employment differentials. We need to find out whether "mature" union-management relations and advanced unionism are accompanied by a decline in the vigor of organized labor—whether success is undermining union enterprise.

The implications that changed concepts of employment have for public employment services and for unemployment compensation also need to be explored. The notion is widespread that the purpose of our employment service should be to serve as a labor clearinghouse—as a sort of central market along the lines of commodity and stock exchanges.

Where the welfare concept of employment predominates, the commodity-exchange view of the employment service is not only unrealistic but also likely to be downright misleading. Between a particular employer and employee, employment builds up a strengthening network of relationships, rights and benefits geared to length of service. Those company ties, as indicated by the quit statistics, restrict the free flow of labor, causing it to congeal around individual firms. Workers become more and more tied to particular companies by nonprice attractions that are nontransferable.

No one would think of applying a labor-market concept to the feudal economy of the medieval manor. The serfs would not fit into that kind of intellectual framework. Although employment with our large firms still is a far cry from feudal relationships, nevertheless the trend toward accumulating company obligations and attachments is unmistakable. Consequently, it is becoming more fanciful to visualize public employment exchanges as potentially comprehensive labor exchanges for the community. Less and less does labor "flow" like commodities; more and more it is developing a single work-life attachment to a company, which tie extends into the period of retirement of the employee.

This absolute liberty of the employe to have freedom of choice and to do as he pleases with utter disregard of the will of the majority was clearly condemned by the Supreme Court of the United States in the Draper case when it said that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body to create and restrict the rights of those whom it represents."

—Jerome L. Toner, O.S.B.

Employment as work-life attachment to a firm raises problems for unemployment compensation. When a worker with considerable seniority is on temporary layoff from his company, say for three or four weeks, is it sound practice for the employment service to endeavor to place him in employment in another firm? Is it sensible to insist that he engage in "active search for work" by making application for jobs elsewhere, especially if his company is paying him supplemental unemployment compensation?

Some companies have a regular yearly pattern of layoffs for, say, a month. This is likely to be true of automobile companies with the model changeover or with firms producing for the Christmas trade, such as toy-train and doll manufacturers. To long-service employees of such concerns, who expect only a short layoff and who are partially supported by company unemployment benefits during the interval, insistence that they actively seek another full-time job may seem rather senseless. Managements of firms to which the employees on temporary layoff are forced to apply for regular employment may also consider the whole

Workers like union security because it helps all the workers, as "citizens" of their industry or trade, to share the responsibilities of the union. . . . Union leaders like union security because it eliminates the threat that their organizations may be undermined through outside or illegal interference.—From a pamphlet by the AFL-CIO.

procedure something of a farce. Note that the tie of company unemployment benefits is an added obstacle to transfer of labor between firms.

Unemployment compensation rests on a particular conception of employment and labor mobility. That explains, for example, certain provisions of state laws with respect to disqualification from benefits, such as requirements that claimants be available for full-time employment on another job, be actively seeking suitable employment or be making a reasonable effort to obtain work and be able to supply evidence of such effort.

Clearly our unemployment compensation laws should be re-examined in the light of new employment concepts. Where a whole network of relationships, rights and obligations has developed, perhaps a brief layoff should not necessitate state efforts to break those ties, even temporarily. At least, questions of this sort have been raised by the new developments in industrial employment, and they can only be answered satisfactorily after a thorough restudy of the setting in which the principles are applied.

Finally, there are the implications of welfare employment for the future of American capitalism. What is the role of the changing concept of employment in a theory of capitalist development? Is the drive to remove distinctions in industry and to make labor more like management serving to transform American capitalism into some new kind of "Middle Way" that is not socialism, not codetermination and not industry planning?

It will be recalled that Karl Marx and the nineteenth century socialists believed that industrial evolution would produce increasing poverty among the workers and develop a greater and greater gulf between employers and factory employees. Actually, the contrary has been the case. In this country, manual workers have improved relatively in pay, status and perquisites. Differentials have been reduced; the long work day and inhuman treatment have largely disappeared from American industry although they may still exist in large areas of the world, especially in so-called underdeveloped countries. In short, we have witnessed the kind of welfare employment and welfare capitalism that socialist writers of the past century said was impossible.

Although "the impossible" has occurred, men's minds have not adapted to the change. Our concepts are still largely oriented to nineteenth-century conditions. We shall fail to comprehend the full meaning and enormity of developments during the past four decades until we revise our theoretical constructs and free our thinking from old mental ruts.

New thought patterns are necessary to assess correctly recent developments in the employment field and to understand the directions of future change—to comprehend the kind of capitalism that is emerging based on an altered view of employment. This is not exactly the century of the common man but it is at least the era of more humane and dignified relationships in the factory. On that score we can invite systematic comparison with Communist Russia.

Although nothing is so uncertain as the future, we can be sure that the concept of employment will keep on changing. Undoubtedly American industry, stimulated by union pressures and by social advances, will provide new and enduring satisfactions for workers. The dramatic cumulative change will continue. The new terms and conditions of employment will be a crucial element in the evolution of our economy. To a considerable extent, our future economic society is being formed in the thousands of union-management negotiations that occur each year.

An economic system molds people as well as products, and, in the long run, what industry does to men is more important than what it does to materials. Consequently, alterations in the employment complex may, over a period of time, be fully as potent for a nation's economic well-being as changes in physical techniques of manufacture.

I end, therefore, with an admonition paraphrasing the late J. M. Keynes. Concepts can be more powerful than is commonly understood. Indeed, the way we look at the world determines not only what we see but also what we think. Soon or late, it is ideas, not articles of commerce, which are dangerous for good or evil. **[The End]**

Determination of the Bargaining Representative

By STEPHEN S. BEAN

The NLRB's representation processes and its approach to representation cases are the subjects of this paper. It was delivered at the Labor Law Institute presented by the North Carolina Bar Association and the Law Schools of Duke University, University of North Carolina, and Wake Forest College.

THE HEART of the National Labor Relations Act, which appears as Title I of the Labor Management Relations Act of 1947, is expressed in Section 7 as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

In its primary purpose of protecting the right of employees to organize for collective bargaining, the present act is like the Wagner Act which preceded it, except that in 1947 a provision was added which also guarantees the right to refrain from such activities. This latter right, however, is subject to the limitation that it may be affected by a contract embodying certain legally permissible union-shop provisions.

In any discussion of the National Labor Relations Board's administration of the provisions of the act, it should be kept in mind from the very outset that the Board is principally charged with the performance of two distinct functions:

(1) It administers Section 9 of the act, which requires that an employer bargain with the representative selected by a majority of his employees in a unit appropriate for collective bargaining, and that such agent shall be the *exclusive* representative of *all* the employees in such unit.

(2) Section 10(a) of the act provides that "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. . . ."

These two functions are essentially different in character. The function of determining representatives is essentially an administrative function, while the Board's powers with respect to unfair labor practices are essentially adjudicatory or, as it is customarily referred to, "quasi-judicial" in function. I am concerned in this paper with the first of these two functions—the Board's part in the designation and selection of a representative by employees, as provided in Section 9.

The act, of course, does not require that an employee representative be chosen by any particular procedure, so long as the representative is clearly the choice of a majority of employees. However, as a desirable method of determining the selection of a majority representative, and one to which a number of legal and practical advantages attach, the act authorizes the Board to conduct representation elections. The proceeding for that purpose is initiated by the filing of a petition in the regional office in the area in which the plant or business involved is located. The Board's regional office for the eleventh region is located in Winston-Salem and serves an area comprising North and South Carolina. Standard forms for filing petitions in all types of representation cases are provided in the regional offices.

The act in Section 9(c)(1) provides for the filing of such petitions by employees,

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or by an individual or labor organization acting in their behalf, or by an employer who has been confronted with a claim of representation from an individual or a labor organization. Although the statute thus provides for various parties who may file representation petitions, by far the greater number of petitions filed are by unions which claim representation of some particular unit of employees. The act also provides for the filing by employees or their representatives of what are known as decertification petitions, that is, petitions for an election to demonstrate that a labor organization which an employer is currently recognizing as his employees' bargaining representative, or which may have been certified as representative by the Board, is in fact no longer designated as representative by a majority of the employees.[1]

Upon the filing of any one of these various types of representation petitions, it becomes the Board's duty to investigate the petition and to determine whether there is reasonable cause to believe that a question of representation exists. The initial investigation is made by the personnel in the Board's regional office, who must procure information concerning whether (1) the employer's business enterprise is of such character and scope as to fall within the reach of the federal regulation provided by the act, (2) the amount of business involved is sufficient to meet the Board's standards for the assertion of its jurisdiction and (3) there is otherwise sufficient reason for proceeding with the petition. In the case of any petition other than by an employer, the Board requires submission of a showing that a sufficient number of employees favor the proposed election to justify the Board in conducting it. The number required is 30 per cent of those in the unit appropriate for representation—a figure which is determined administratively by the regional staff and may not be litigated at the subsequent representation hearing. A 30 per cent showing is not required, however, of an intervenor, such as a rival labor organization or a union currently recognized by the employer, who may intervene upon the showing of a contract covering the employees or some lesser representative interest.

If the Board's regional director is satisfied with the results of the preliminary investigation, he then proceeds to issue notice of a hearing for the taking of evidence concerning the various matters on which the Board must be informed in determining the direction of an election. A hearing may be avoided, however, if the parties are not in disagreement as to any of the matters involved and wish to expedite the proceedings by entering into an agreement authorizing the regional director to conduct an election without the formality of a hearing and submission to the Board for its determination. This is a common form of procedure which is encouraged and is known as a consent-election agreement. A similar agreement, which provides for a consent election to be held but thereafter for the Board in Washington to determine and certify the results, is known as a "Stipulation for Certification upon Consent Election."

If the parties do not agree to a consent election, a hearing is held, usually conducted by an officer or employee of the regional office. His only function is to see that by means of testimony and other evidence a record is made that is adequate for the Board's purpose of making the necessary determinations. The entire transcript and documents connected with the hearing are submitted to the Board, together with a brief report by the hearing officer who is by statute prohibited from making any recommendations on the issues involved. Briefs are also accepted from the parties.

The principal determination required to be made by the Board is, of course, whether or not a question concerning representation exists. This may be shown initially, and usually rather routinely: (1) Evidence may be introduced to the effect that a demand has been made upon the employer by a union for recognition as bargaining representative, with which demand the employer has refused to comply. (2) The employer's disclosure at the hearing that he is unwilling to comply with the demand for recognition implicit in the union's petition may be sufficient. (3) In the case of an employer petition, evidence of the existence of a present demand for recognition made upon

[1] I may mention, in passing, one other form of election which the Board is authorized to conduct but which does not bear directly upon the question of majority representation. This is a "union deauthorization" election, which the Board conducts in response to the filing of a petition by 30 per cent of the employees asserting that they desire to rescind the authority of the union which represents them to include the statutory union-shop provision in the contract with their employer.

The low-priced automobile costs the average factory worker less in terms of hours worked today than a comparable car cost him back in 1940 or 1941. —Benson Ford

the employer by a union or other asserted representative is enough. For example, picketing for the manifest purpose of obtaining recognition is tantamount to such a demand.[2]

Whether an election will be held, however, depends also upon the disposition of various other statutory and administrative questions, such as to the qualification of the party seeking to act as bargaining agent; as to any possible bars to a present election—for example, an outstanding contract covering the employees sought to be represented or a prior representation determination by the Board; and as to the appropriateness of the proposed bargaining unit. The questions thus presented for determination by the Board, and subsequent issues which may arise upon the conduct of an election, are the subjects to which I will devote the remainder of my discussion. Their treatment here, however, is not in the least intended to be exhaustive, but rather only to touch upon the highlights. It simply is not possible in a short space of time adequately to reflect the great variety of factual situations in which the representation problems I mention are continually being presented for decision by the Board.

Qualifications of Representative

A labor organization may have resort to the Board's representation processes and be certified only if it is in compliance with the filing requirements of Section 9(f), (g) and (h) of the act. The first two parts of this section contain the provisions which require a labor organization to file annually with the Secretary of Labor copies of its constitution and bylaws, and information concerning its officers, initiation fees, dues and various aspects of its procedures. Section 9(h) is the section which imposes the requirement that each officer of a labor organization, and of any national or international organization of which it is an affiliate or constituent part, must have filed with the Board within the preceding 12-month period an affidavit that he is not a member of, or affiliated with, the Communist party or any organization that believes in or teaches the overthrow of the United States Government by force or illegal or unconstitutional methods. The Supreme Court has held in the *Highland Park* case[3] that the prerequisite requirement of filing such non-Communist affidavits is one which extends even to the parent federations themselves, that is, to the AFL and CIO parent bodies which have now merged into the AFL-CIO.

There are certain particular classes of individuals or employees who are given special treatment under the act. Unlike the earlier Wagner Act, supervisors under the Taft-Hartley Act are excluded by definition from the classification of employees.[4] Hence, a union of supervisors cannot have recourse to any of the processes of the act for certification or other provisions to secure bargaining. Supervisors are not, however, prohibited from joining labor organizations or engaging in collective bargaining apart from the assistance of the act's procedures.[5] Section 9(b)(3) prohibits a labor organization from being certified as representative of a unit of plant guards if it "admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Although it is permissible for an individual, as well as a labor organization, to be certified as the bargaining representative of employees, the Board will not certify any representative which is found to lack the qualifications of a bona fide bargaining agent. The Board has held, however, that the capacity of a union which is willing to represent employees is not affected by internal union matters, such as limitations on the eligibility of employees to the union's membership.[6] In the case of a union which seeks to become the representative of a craft unit by means of an election to sever the craft employees as a group from an already existing larger bargaining unit, the Board adheres to its doctrine, enunciated several years ago in the *American Potash* case,[7] that the organization seeking such craft severance either must be one which has traditionally represented the particular craft or has been organized for the sole and

[2] *Jerome E. Mundy Company, Inc.*, 116 NLRB 1487.
[3] *NLRB v. Highland Park Manufacturing Company*, 19 LABOR CASES ¶ 66.327, 341 U. S. 322.
[4] Section 2(3). See also Section 2(11) defining the term "supervisor."
[5] Section 14(a).
[6] *"M" System, Inc.*, 115 NLRB 1316.
[7] *American Potash & Chemical Corporation*, 107 NLRB 1418.

exclusive purpose of representing the specific craft.[8] The "traditional representative" test is not applicable, of course, where an election is sought among craft employees who have not previously been represented.[9]

Contract as Bar to Election

The Board has long held that in the interest of promoting stability in collective bargaining relations, an election should not be held while there is in existence a current contract between a labor organization and the employer covering the employees for whom representation is sought to be achieved by a rival union. However, for a contract to bar an election it must first of all be a valid collective bargaining agreement in writing.[10] As a general rule, it must have been duly executed by the parties,[11] although recently the Board has permitted a contract to stand as a bar where final agreements had been reached by the parties and put into effect pending formal execution of the final document.[12]

The contract must also be of reasonable duration. Generally a term of two years or less is considered reasonable. In accord with this view, contracts for a duration longer than two years are ordinarily effective to bar an election only during the first two years of their term.[13] However, an exception is made where it can be shown that a substantial part of the particular industry involved is covered by contracts with terms longer than two years. An instance is the present pattern of three-year contracts in the basic steel industry.[14] Permanent contracts which have no fixed term but are of indefinite duration are held to be bars for a period of two years after their execution.[15] However, mere stopgap or temporary agreements, such as those entered into for the purpose merely of extending an old agreement until a new one can be executed, will not serve to bar a representation election.[16]

In order for a contract to bar an election, the unit of employees covered by the contract must be an appropriate one for bargaining purposes.[17] However, the contract, although it covers an appropriate unit, must be one which fulfills the union's duty as the exclusive statutory representative to afford representation to all individuals within the unit. A contract which discloses an intent to represent the union's members only will not serve as a bar.[18] If an employer merges his operation with that of another employer so that the result is comparable to an entirely new operation, the contract which covered the original operation will not be a bar.[19]

A contract must also be one which contains sufficient substantive terms and conditions of employment to lend stability to the employer-employee relationship and satisfy the ends of bargaining. A contract of a limited type, such as one relating only to pensions, is insufficient to forestall a new determination of representatives.[20] The Board will not recognize as a bar a contract which on its face contravenes the act.[21] Common types of contract provisions, which the Board has deemed to remove an otherwise valid contract as a bar, are union-security clauses which are illegal either because the contracting union had failed to meet in a timely fashion the filing requirements of Section 9(f), (g) and (h), which I mentioned earlier, or because the union-security provisions themselves exceed the provisions permissible under the proviso contained in Section 8(a)(3).

The act in Section 8(a)(3) requires that a union which makes a union-security contract must be in compliance with the filing requirements at the time the agreement is made, or within the preceding 12 months. The Board has held that in the case of a contract containing a provision, such as appears in many labor-relations contracts, whereby periodically it becomes automatically renewed for an additional term or terms, the contract in effect is "made" each time it is renewed for an additional period,[22] and

[8] *Friden Calculating Machine Company, Inc.*, 110 NLRB 1618.
[9] *Pittsburgh Plate Glass Company*, 117 NLRB 1728.
[10] *Hardboard Fabricators Corporation*, 117 NLRB 823.
[11] *Gibson Refrigerator Company*, 117 NLRB 561.
[12] *Mervin Wave Clip Company, Inc.*, 114 NLRB 157; *Natona Mills, Inc.*, 112 NLRB 236; *Oswego Falls Corporation*, 110 NLRB 621.
[13] *Pazan Motor Freight, Inc.*, 116 NLRB 1568.
[14] *Cf. C. A. Olsen Manufacturing Company*, 5 CCH Labor Law Reports (4th Ed.), ¶ 54,672. 118 NLRB 362. See majority opinion in *Thompson Wire Company*, 116 NLRB 1933.
[15] *Diamond Lumber Company*, 117 NLRB 135.
[16] *M. B. Farrin Lumber Company*, 117 NLRB 575.
[17] *Monsanto Chemical Company*, 108 NLRB 870.
[18] *Solventol Chemical Products, Inc.*, 113 NLRB 617.
[19] *Hooker Electrochemical Company*, 116 NLRB 1393.
[20] *General Refractories Company*, 117 NLRB 81.
[21] *Awning Research Institute*, 116 NLRB 505.
[22] *Hughes-Vertin Lime Company*, 104 NLRB 185.

In the final analysis, the best insurance against loss of jobs is a healthy Company and a strong economy.
—Henry Ford II

the union-security clause in such a contract becomes invalid if the union's filings have lapsed at the time of the automatic renewal.[23] Sometimes union contracts contain language purporting to defer the application of a union-security provision until such time as it may legally become effective. In such cases the Board has held that the taking effect of such a provision must in fact be deferred, and not made presently effective subject to later defeasance.[24]

The union-security provision of the act, appearing as a proviso to Section 8(a)(3), is one which permits an employer and labor organization to make an agreement "to require as a condition of employment membership [in the union] therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ." The Board holds that a union-shop clause which in any manner fails to guarantee to employees this 30-day grace period for joining the union renders the contract inoperative as a bar. This is true as to a decertification petition just as in the case of a petition for certification.[25] The statutory provision has also been interpreted as not being intended to mean that old employees, who were employed and were union members before the execution of the union security agreement, should be given an opportunity to drop out of the union only to have to join again at the end of 30 days.[26] However, it has also been held that old employees who were *not* union members at the time the contract was executed must be accorded a 30-day period to acquire union membership, just as in the case of new employees.[27]

In one type of case the Board will entertain a petition for an election even during the effective period of a contract whose term is not unreasonable. This is the situation where a schism within the union has created serious confusion or doubt as to the identity of the bargaining representative recognized by the employer.[28] This is commonly called the Board's "schism doctrine." The rule has been a salutary and desirable one, but the Board has had to apply it carefully and with restrictions. Thus, for it to be applied there must have been some formalized disaffiliation action,[29] and the Board must be convinced that the bargaining relationship is so confused that no stabilizing purpose will be served by applying the contract-bar principle. Thus, where the contracting union continues to function and to administer the contract as the recognized bargaining representative, and the situation appears to disclose no more than an expression of dissatisfaction by a dissident element within the union, the schism doctrine will not be applied.[30] However, in applying the schism doctrine, the Board has continued to affirm the principle, enunciated in the *Lawrence Leather* case,[31] that where a local group effectively disaffiliates from a union which has been expelled from its parent organization because of reasons such as Communist domination, the contract executed before the schism ceases to bar a new election.[32]

In general, a contract which is not executed, renewed or to become effective until after the filing of a rival petition for an election is not a bar to the processing of the petition. However, the Board has announced that in the case of a newly executed contract, as distinguished from one automatically renewed, the employer must have actual notice of the filing of the petition as of the time of execution of the contract in order to forestall the contract as a bar.[33] For a number of years the Board has followed a rule, which it first established in the *G. E. X-Ray* case,[34] that a mere claim of representation made by a rival union will not prevent a subsequent contract from being a bar, unless the claim is followed up within ten days by the filing of a petition. However, this rule does not apply to a contract entered into during the automatic

[23] *Stemar Company*, 116 NLRB 578.
[24] *Triangle Tanning Company*, 115 NLRB 271.
[25] *Bazely and Junedale Meat Markets Company*, 114 NLRB 66.
[26] *Milwaukee Gas Light Company*, 111 NLRB 837; *Charles A. Krause Milling Company*, 97 NLRB 536.
[27] *Industries Freight Service*, 116 NLRB 1164.
[28] *John Deere Plow Works of Deere & Company*, 115 NLRB 923.
[29] *Standard Conveyor Company*, 114 NLRB 1447.
[30] *Thompson Wire Company*, 116 NLRB 1933.
[31] *A. C. Lawrence Leather Company*, 108 NLRB 546.
[32] *Westinghouse Electric Corporation*, 116 NLRB 1642.
[33] *Anheuser-Busch, Inc.*, 116 NLRB 186. Cf. *Westinghouse Electric Corporation*, 117 NLRB 520.
[34] *General Electric X-Ray Corporation*, 67 NLRB 997.

The greatest shortage [in executives] is in fast growing young firms with no long-standing reputation for being dynamic. Executive talent takes longer to develop than economic size and power.—Dr. Eugene E. Jennings, associate professor of business administration, Michigan State University.

renewal period,[35] which is the period in many contracts between the last date on which either party must give the other notice to prevent automatic renewal and the later date on which a new term commences. The Board regards this as a period which the parties themselves have provided for the negotiation of a new contract, and believes that stability in labor relations requires that during this period the parties should be protected against any claim except the actual filing of a petition before the new contract is executed.[36] Of course, an existing contract is not a bar if one of the parties has in fact given notice to prevent automatic renewal in accordance with its terms. The question of what constitutes a notice to terminate depends largely upon the nature of the particular contractual provision.

As mentioned above, a contract generally serves as a bar to an election during a term of at least two years. Because this is true, it would seem that in the absence of some serious disagreement between them, a union and employer could readily forestall any possible effort of the employees to select another representative simply by the device of entering into a new contract well before the old contract began to approach its expiration or renewal date, and repeating this procedure every two years. Therefore, in order to assure that employees may have an opportunity at regular and predictable intervals to express themselves, if they so desire, concerning their choice of representatives, the Board has adopted what is termed its "premature extension" doctrine. In substance this doctrine holds that where a new contract is executed by an employer and union at a time when their existing contract still remains a bar to an election, the Board will not give effect to the new contract as a complete bar but will permit a representation petition to be filed at such time as it might have been filed had no new contract been executed. In order to protect the rights of employees, this doctrine is applied regardless of whether the contracting parties have acted in good faith, and even though there may have been no intention of forestalling a redetermination of representatives.[37] The doctrine applies regardless of whether the agreement which extends the parties contractual relationship is a new and separate contract or takes the form of a supplement, amendment or extension of the original contract.[38] However, if the earlier contract had ceased to be a bar at the time that the new or extension agreement was executed, the rule of premature extension does not apply.[39]

One-Year Certification Rule

Under its one-year rule on certifications, the Board ordinarily will dismiss a petition by a rival union filed within one year after a bargaining representative has been certified.[40] This is done in order to protect the bargaining relationship thus established from disturbance during that period.

If a contract is executed during the certification year, an election continues to be barred during the term of the first such contract.[41]

Statutory 12-Month Limitation on Elections

Not only will the Board refuse to entertain a rival petition within one year after a certification, but also the act itself contains a limitation upon the frequency of holding elections. Thus, Section 9(c)(3) reads in part as follows:

"No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

The Board has held that this statutory 12-month period runs from the date of the balloting and, in the case of a union which had lost the election, not from the date on

[35] Called the "Mill B" period after the title of an early case.
[36] *Spencer Kellogg and Sons, Inc.*, 115 NLRB 838.
[37] *Wyman-Gordon Company*, 117 NLRB 75.
[38] *Stubnitz Greene Corporation*, 116 NLRB 965.
[39] *Heintz Manufacturing Company*, 116 NLRB 183.
[40] *Weston Biscuit Company, Inc.*, 117 NLRB 1206. The one-year certification rule was approved by the Supreme Court in *Ray Brooks v. NLRB*, 27 LABOR CASES ¶ 68,835, 348 U. S. 96.
[41] *Ludlow Typograph Company*, 108 NLRB 1463.

which the Board certified the election results.[42] In administering this section the Board has given the same effect to state conducted elections as to Board elections where the state elections were conducted under proper safeguards.[43] However, in one case a Board majority held that a state election in a unit which was not proper under federal standards because it included supervisors was not a valid election such as to bar a Board election under Section 9(c)(3).[44]

Unit Appropriate for Collective Bargaining

The Board is charged with the duty in each case of determining whether, in the words of Section 9(b), "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." This same section also sets out certain limitations on the unit placement of professional employees, craft groups and guards. Section 9(c)(5) provides that in determining whether a unit is appropriate for bargaining, "the extent to which the employees have organized shall not be controlling." Section 2(3) of the act precludes the Board from including agricultural laborers, independent contractors, and supervisors in any unit found appropriate, by virtue of that section's exclusion of these categories and certain others from the act's definition of "employees."

In determining the composition of bargaining units, the Board in general attempts to give effect to the community of interests existing among employees. One factor to which the Board attaches some importance is the past bargaining history, in cases where such a history exists. Thus, although a unit limited to the employees of a single employer is usually presumed to be the appropriate unit, if there has been a history of bargaining over a substantial period of time by a group of employers with a representative of their employees in a single unit, the Board will find such a *multiemployer unit* appropriate.[45] In such cases, however, an individual employer may withdraw from multiemployer bargaining and thereby reestablish the employees in his own operations as a separate unit or units. However, such a withdrawal must be unequivocal and clearly indicate an intent by the employer henceforth to pursue an individual course of action.[46] The withdrawal must be made at an appropriate time with respect to the course of the multiemployer labor relations, such as at the time of termination or automatic renewal of the multiemployer contract, or prior to the execution of a new agreement.

The Board continues to grant separate units to *crafts* and to certain departmental groups which have traditionally been the subject of separate representation, usually by virtue of their possession of craft-like characteristics. The union seeking to represent craft employees must show that the employees constitute a true craft as indicated by their possession of skill acquired through extensive training or apprenticeship, and that they exercise such skills in their employment. In order for a craft unit to be appropriate, it must include all employees possessing the particular craft skills and performing comparable craft work.[47] The employees must constitute an "identifiable, skilled, and homogeneous craft group."[48]

In cases where the employees in the craft or departmental group sought to be represented are already included for bargaining purposes with other employees in a plantwide or similar broad unit, the Board imposes still another requirement before it will grant a separate election limited to such a craft or department. This is the requirement set forth several years ago in the *American Potash* case[49] which, as I have previously pointed out, holds that the union seeking an election must be one which traditionally has represented employees of the craft or department sought in its petition. The Board has more recently held that a union newly organized specially to represent the craft or departmental group shall likewise meet the *American Potash* test.[50]

As to *plant guards*, Section 9(b)(3) requires that they may not be included in

[42] *Kolcast Industries, Inc.*, 117 NLRB 418.
[43] *T-H Products Company*, 113 NLRB 1246; *Olin Mathieson Chemical Corporation*, 115 NLRB 1501.
[44] *Clements Auto Company d.b.a. Southern Minnesota Supply Company*, 116 NLRB 968.
[45] *Logan Printing Company*, 115 NLRB 1111.
[46] *Jones & Anderson Logging Company, Inc.*, 114 NLRB 1203.
[47] *CBS-Hytron, A Division of Columbia Broadcasting System, Inc.*, 115 NLRB 1702.
[48] *San Manuel Copper Corporation*, 116 NLRB 1153.
[49] Cited at footnote 7.
[50] *Fort Die Casting Corporation*, 115 NLRB 1749.

In the spring of last year 28 percent of the estimated 38.9 million married couples in the Nation were working couples. Eleven years earlier, at the end of World War Two, the proportion had been only about 20 percent.

—Bureau of the Census

units with other employees. This same section defines a guard as one employed "to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." The section also prohibits any labor organization from being certified as the representative of a unit of guards "if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Employees who perform regular guard duties during a portion of their working time are considered to be guards within the contemplation of the act and accordingly are excluded from nonguard units.[51]

Section 9(b)(2) requires in effect that *professional employees* not be included in a unit with other employees unless a majority of such professional employees vote for this inclusion. The statute thus in every case gives professional employees an opportunity for separate representation if they wish it. Therefore, when professional employees are sought to be represented along with other employees who are not professionals, the Board ordinarily provides two ballots for voting by each employee in the professional group. On one of these ballots the voter may indicate whether or not he wishes to be represented with the nonprofessionals in a single bargaining unit, and on the other ballot he indicates his choice as to representation by the union or unions involved in the case. If a majority of the professionals vote to be represented separately, their ballots as to representation are then tallied to see if they have designated a representative for their separate unit. If a majority vote to be included in the larger unit, their ballots are counted as part of the total to determine the question of representation of the larger group.

As I have previously mentioned, the statute excludes *agricultural laborers*[52] from the definition of "employees" who are entitled to the benefits of collective bargaining under the act. Over the period of its history the Board has not infrequently been confronted with the question of how to deal with employees who divide their time between different types of employment for the same employer, performing some tasks which are within the purview of the National Labor Relations Act and others which are clearly agricultural labor. The Board has not always given the same answer, at one time holding that if employees spent any substantial part of their time in agricultural work they were outside the act for all purposes.[53] More recently, however, the Board has ruled that employees who divide their time but who regularly do nonagricultural work may be included within a bargaining unit under the act for that part of their work which is nonagricultural.[54]

As to *independent contractors*, who also are excluded from the act by definition, the determination of independent contractor status depends upon the facts of each particular case, and no one factor is determinative. The Board, however, has placed considerable reliance in many cases on the well-known "right-of-control" test. Thus, if it appears that the person for whom services are being performed reserves and exercises control only in respect to the end result sought to be obtained, the one performing the services is deemed to be an independent contractor. However, on the other hand, if the one for whom the services are performed also retains control especially over the means and manner in which the result is sought to be accomplished, an employer-employee relationship is indicated.[55]

Supervisors, who are excluded from coverage by the act through the definition of "employee" in Section 2(3), are themselves defined in Section 2(11). That section describes a supervisor as follows:

". . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them,

[51] *United States Gypsum Company*, 5 CCH Labor Law Reports (4th Ed.), ¶ 54,634, 118 NLRB 20; *Walterboro Manufacturing Corporation*, 106 NLRB 1383.

[52] The Board for several years has been required, by a rider attached to its appropriations act, to follow the definition of "agricultural labor" appearing in the Fair Labor Standards Act.

[53] *Clinton Foods, Inc.*, 108 NLRB 85.

[54] *Olaa Sugar Company, Limited*, 5 CCH Labor Law Reports (4th Ed.), ¶ 54,888, 118 NLRB, No. 195.

[55] *National Van Lines*, 117 NLRB 1213.

Today almost 90 million persons live in 168 areas around the United States classified as "metropolitan." These people live on one-fourteenth of the land area but they constitute roughly one-half of the nation's population.—Gustave Serino, professor of government, University of Miami (Florida).

or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

This seemingly rather complicated definition is in most instances not especially difficult to apply. The possession of any one of the attributes of supervisory status thus enumerated is sufficient to disqualify an individual from inclusion in a bargaining unit, and in every plant or industry there are those who may thus be quickly recognized as supervisors. Difficulty arises, however, with application of the definition to the lower or fringe levels of supervision—in distinguishing from true supervisors those whose duties call for them merely to instruct or lead other employees, or to assist in channeling the flow of work. However, here again the conclusion to be reached must depend upon the particular facts in any given case. For example, the Board has held that in general the authority which skilled workers exercise over relatively unskilled workers is not supervisory.[56] The Board has also held that individuals whose regular duties are those of rank-and-file employees do not acquire supervisory status merely because they substitute for foremen on the infrequent and sporadic occasions when the latter are absent because of illness or vacation.[57] However, an individual who regularly exercises supervisory authority, even though only part time, is excluded from a unit as a supervisor.

As a matter of policy, the Board excludes *office clerical employees* from units of manual production and maintenance workers. *Plant clerical employees*, whose place of work is not in the main office but out in the plant and whose work is closely associated with the production process, are properly to be included with the production employees.[58] In retail stores, however, office clericals may be included in store-wide units with sales clerks as well as nonselling employees.[59]

Technical employees will be excluded from plant-wide units if any party objects to their inclusion.[60] If a separate unit of technical employees is sought, the Board will find such a unit appropriate. It is possible for the same union that represents a unit of the production and maintenance employees to represent also a separate unit of technicals.[61]

Conduct of Representation Elections

Section 9(c)(1) requires that when either a representation or decertification petition is filed and a hearing is held, and the Board finds upon the record of the hearing that a question of representation in fact exists, the Board shall proceed to direct the holding of an election by secret ballot and thereafter shall certify the results of the election.

The election is conducted by the Board's regional office, which arranges all the necessary details. However, such matters as the timing of elections, eligibility to vote and the standards of conduct necessary to insure a valid election are subject to rules laid down in the Board's Rules and Regulations and to guides disclosed by the Board in its decisions.

Ordinarily an election is held within the period of 30 days from the date of the Board's issuance of its decision and its direction of election. Necessarily this is sometimes varied in certain cases such as those involving wholly seasonal industries, in which case the Board provides that the election may come during the peak of seasonal employment.[62] In the case of an industry or plant which is in the process of expanding, the Board will not necessarily defer an election but may direct the holding of a present election if it is clear that at the time of the election a substantial and representative complement of employees will be employed.[63]

The Board will not ordinarily proceed with an election while charges of unfair

[56] *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787.
[57] *Dixie Lou Frocks, Inc.*, 117 NLRB 1583.
[58] *William R. Whittaker Company, Ltd.*, 117 NLRB 339.
[59] See *Interstate Supply Company*, 117 NLRB 1062.
[60] *United States Gypsum Company*, 114 NLRB 523.
[61] See case cited at footnote 60.
[62] *Cleveland Cliffs Iron Company*, 117 NLRB 668.
[63] *Walton-Young Corporation*, 117 NLRB 51.

During the year 1938, when personal incomes fell 10 per cent, automobile sales suffered a loss of 50 per cent.

labor practices are pending.[64] However, with respect to most of these charges it is possible for the charging party to file a waiver of the charges as the basis for any later objections to the results of the election, in which case the Board will proceed with the election.[65] If the charges have been dismissed by the regional director, although the matter may be pending on appeal to the General Counsel from the regional director's dismissal, the Board will not for this reason further delay the direction of an election.[66]

Eligibility to vote is customarily limited to those individuals within the unit who were employed during the last payroll period immediately preceding the issuance of the Board's direction of election and who have not subsequently quit or been discharged. Employees who were employed on the eligibility date but who are temporarily laid off or absent because of illness, vacation or similar reasons are eligible. So, also, are employees in the military service who appear in person at the polls. Strikers are eligible except those who are not entitled to reinstatement. These provisions as to eligibility appear in each of the Board's formal directions of election.

Before an election, an employer is furnished official notices of election by the regional director for posting in accordance with specific instructions. It is the Board's practice also to require the employer to furnish a list of employees within the unit who may be eligible to vote. The list is used as a check list at the election. Often a conference of the parties, together with a Board agent, is held before the election to discuss the eligibility list, resolve questions that may arise concerning individuals listed and ascertain if there are voters who the parties or the Board itself may wish to challenge at the election. The Board has held that the mere preparation and checking of an eligibility list does not ordinarily constitute a binding agreement between the parties as to eligibility, although the parties may, subject to certain conditions, make written agreements as to eligibility which will be honored by the Board.[67] However, such agreements are not binding where they are contrary to established Board policy.[68]

After the election has been held, any of the parties may within five days file objections to the conduct of the election with the regional director under whose supervision the election was held. The regional director then makes a report on the objections, as to which any party may file exceptions with the Board. The issues raised by exceptions to the regional director's report are considered by the Board. If it is found necessary to do so, the Board may conduct a further hearing to obtain evidence relative to matters in dispute before making its determination on the objections. Upon consideration, if the objections are found to have merit, the Board may set the election aside and direct that a new election be held. Issues relating to challenged ballots, if they are sufficient in number to affect the results of the election, may likewise be resolved in a similar manner.

In general, for the Board to set an election aside it must be found that there was some conduct which may reasonably be regarded as having interfered with exercise by the employees of a free choice in the election. Examples of this may be threats or coercion by one of the parties, such as an employer's threat to close its plant or to curtail some employee benefit if the union is selected as representative. The Board, however, has also prescribed certain electioneering rules designed to aid in preventing interference with freedom of choice. Thus, for several years the Board has followed a rule, enunciated in the *Peerless Plywood* case,[69] which prohibits "election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." This rule has been held to apply not only to an employer's pre-election speech to his employees assembled on company time in the plant but also to the union's conduct in broadcasting a speech from a sound truck, which could be heard by the employees at work within the plant during the day before the election.[70] The rule is

[64] *Coffey's Transfer Company*, 115 NLRB 888.
[65] *Milham Products Company, Inc.*, 114 NLRB 1544.
[66] *Le Roi Division, Westinghouse Airbrake Company*, 114 NLRB 893.
[67] *Norris-Thermador Corporation*, 5 CCH Labor Law Reports (4th Ed.), ¶ 55,113, 119 NLRB, No. 155.
[68] *Westlake Plastics Company and Crystal-X Corporation*, 5 CCH Labor Law Reports (4th Ed.), ¶ 55,159, 119 NLRB, No. 181.
[69] *Peerless Plywood Company*, 107 NLRB 427.
[70] *United States Gypsum Company*, 115 NLRB 734.

held to apply only to speeches and not to the dissemination of campaign literature.[71] The Board, however, has also set aside elections where an employer conducted pre-election private interviews with all or most of the employees in their homes,[72] or singly or in small groups in the employer's private offices,[73] or in other special areas away from where the employees work.[74]

The Board further has established a rule against the use in pre-election campaigns of marked sample ballots which was set forth initially in the *Allied Electric* case.[75] In substance this rule provides that no participant in a pre-election campaign may circulate any document purporting to be a copy of the Board's official ballot unless it is completely unaltered in form and content. The purpose of the rule is "to preserve for parties to an election an atmosphere of impartiality, completely free from the slightest suggestion that . . . [the Board] endorses any particular choice."[76]

The Board generally does not censor or attempt to police election propaganda, but leaves the evaluation of such propaganda to the participants in the election themselves.

Elections have been set aside, however, where campaign methods exceeded the bounds of legitimate propaganda, and lowered the standards to such a point as to impair the free and untrammeled expression of choice by the employees. Such instances have occurred when one of the parties deliberately misstated material facts within its special knowledge, concerning which the employees did not have independent knowledge with which to evaluate the facts and under such circumstances that there was no opportunity for the misstatements to be rebutted. Thus, elections have been set aside in cases where, on the eve of an election, the union distributed handbills deliberately misrepresenting wage rates in its contracts with other companies.[77]

For the last several years it has been the Board's practice not to consider objections relating to matters which have occurred prior to a certain cutoff date preceding the election. The rule in this regard was originally established in the *A & P* case[78] and later revised in the *Woolworth* decision.[79] As stated in *Woolworth*, the rule provides that the Board will not consider as objections to an election matters which have occurred prior to the date of issuance of the Board's direction of an election. This same case also holds that where the parties have agreed to a consent election without the formality of a Board determination, the cutoff date on such objections is the execution by the parties of the consent election agreement.

Amendment of Certifications

The Board has frequently been asked to clarify or amend an outstanding certification in order to reflect some change in the bargaining representative or to cure some ambiguity in the description of the bargaining unit. The Board regards itself as having authority to police its certifications and to clarify or amend them if necessary as a means of effectuating the policies of the act. However, a Board majority recently held in the *Bell Telephone* case[80] that the Board's authority to clarify a unit only extends to cases in which there has been an actual Board certification and not to cases in which the unit has been established merely by contract between the parties. In this case the employer sought the Board's decision as to whether a large group of classifications alleged to have the duties of minor supervisors were in fact supervisors that should be excluded from the unit.

The Board will dismiss a motion for clarification or amendment of a certification if in fact it raises a question of representation which can only be resolved by an election. Thus, the Board has denied a petition to clarify by adding a group of employees similar to those in the unit but whom the Board found to have been expressly excluded from the unit by stipulation and presently to be covered by the contract of another union. The mere fact that the contract might bar an election among them at the time was held not a reason for resort to clarification instead of an election.[81] **[The End]**

[71] *Vita Food Products, Inc. of Maryland*, 116 NLRB 1215.
[72] *Peoria Plastic Company*, 117 NLRB 545.
[73] *General Cable Corporation*, 117 NLRB 573.
[74] *Radiant Lamp Corporation*, 116 NLRB 40.
[75] *Allied Electric Products, Inc.*, 109 NLRB 1270.
[76] *Boro Wood Products Company, Inc.*, 113 NLRB 474.
[77] *Calidyne Company*, 117 NLRB 1026; *Reiss Associates, Inc.*, 116 NLRB 217.
[78] *Great Atlantic & Pacific Tea Company*, 101 NLRB 1118.
[79] *F. W. Woolworth Company*, 109 NLRB 1446; *Joanna Western Mills Company*, 5 CCH Labor Law Reports (4th Ed.), ¶ 55,216, 119 NLRB, No. 207.
[80] *Bell Telephone Company of Pennsylvania*, 5 CCH Labor Law Reports (4th Ed.), ¶ 54,673, 118 NLRB 371, Chairman Leedom and Member Bean dissenting.
[81] *General Motors Corporation*, 117 NLRB 750.

Wages . . . Hours

Rulings

Decisions

Problems

Are Small-Loan Companies Exempted from FLSA?

The Sixth Circuit recently contradicted the First Circuit by holding that the employees of a small-loan company were not within the Fair Labor Standards Act's coverage even though some of the employees were engaged in interstate commerce. The Secretary of Labor had sought a determination that the small-loan establishment was not exempted from the overtime provisions of the act. The small-loan company contended that its business met all the requirements of the "retail and service establishment" exemption.

The amended statutory test for determining whether the employees of an interstate firm are exempt provides that "A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." The record indicated that 90 per cent of the small-loan company's business was solely with persons residing within the state of its location, that it was not engaged in any sales for resale, that loans were given by it only to consumers (and not to dealers) for such purposes as the purchase of household appliances, and that the retail character of the business was recognized in the financial industry.

The court concluded that the small-loan company fell within the "retail and service establishment" exemption and, therefore, its employees were not covered by FLSA.—*Kentucky Finance Company v. Mitchell,* 34 Labor Cases ¶ 71,452.

In the above case the Sixth Circuit, in making industry recognition a relevant part of the test to determine the status of a business, gave a different interpretation to the Congressional intent than was offered by the First Circuit in *Aetna Finance Company v. Mitchell,* 32 Labor Cases ¶ 70,858. The Sixth Circuit gave controlling weight to oral testimony from experts in the financial industry that small-loan firms were recognized in that industry as a retail business. It felt that the language of the statute was clear and unambiguous. The First Circuit, however, was of the opinion that it was not the intention of Congress to permit each industry to decide for itself whether it was conducting a "retail or service establishment." It concluded that a small-loan company does not fall within this exemption. The First Circuit's decision was apparently primarily based on statements contained in legislative committee reports which it construed as not intending to exempt small-loan companies.

New Superhighway's Construction Covered by FLSA

A federal district court in New Jersey was faced recently with the question of whether employees working on a new superhighway were covered by the Fair Labor Standards Act. The court answered in the affirmative. It noted that employees working on new construction are engaged in commerce within the act's coverage when their work is such that it is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it instead of being an isolated local activity.

In the instant case the court held that the construction of the new superhighway in New Jersey was covered by FLSA because the superhighway was a part of the

redesigning of an existing interstate highway system. Thus, the dismissal of a criminal action brought against a construction contractor charged with violating the overtime and record-keeping provisions of the act was denied.

When completed, the superhighway would have 84 interchanges with other highways. The court declared that it was a practical alternative for relief of the traffic congestion on the existing highway system. Reliance was placed on *Mitchell v. Vollmer & Company*, 28 LABOR CASES ¶ 69,243, which held that the construction of a new lock as a part of an alternative route for an existing interstate canal system was covered by the act.—*U. S. v. Newjer Contracting Company*, 34 LABOR CASES ¶ 71,443.

Discrimination Against Workers—Reinstatement Without Back Pay

Employees who were discriminated against for bringing FLSA suits for unpaid wages were ordered reinstated but without back pay in a federal district court decision in Georgia. The Secretary of Labor had brought suit against the employer for an injunction against violation of the FLSA provision prohibiting employers from discharging or in any other manner discriminating against any employee because he has filed any complaint or instituted any proceeding under the act.

The evidence indicated that the alleged discrimination did exist. One employee had quit because of discriminatory changes in working conditions and was denied reinstatement. Two others were laid off and not rehired. The court found that the employees would not have lost their jobs if they had not filed suit against their employer. Thus, the court ordered reinstatement of the employees. The fact that the one employee had resigned of her own will after having been subjected to discriminatory treatment did not make it improper to include her in the reinstatement order.

However, reinstatement was ordered without back pay. In 29 USCA Section 217 it is stated "That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." The court declared that it did not have to decide whether it lacked jurisdiction (because of the above statutory prohibition) to make a back pay award since it would not, in the exercise of judicial discretion, grant the award if the jurisdiction existed. The Secretary of Labor is appealing this decision on the basis that the district court exceeded its judicial discretion in denying an award of back pay.—*Mitchell v. DeMario Jewelry, Inc.*, 34 LABOR CASES ¶ 71,467.

Transporting Equipment Is Compensable Work

An employee's compensable working time includes the time spent in transporting, by truck, equipment indispensable to the work's performance and too heavy to be carried by hand, from an employer's storage yard to a job site and back. This is the substance of a federal district court's holding in New Mexico.

The case involved three companies which service oil wells. Each company transported heavy equipment to and from well sites in a heavy truck. Other equipment and crew members were transported in a pick-up truck. These vehicles were driven by crew members who were not paid for driving time. The court agreed with the Secretary of Labor's contention that failure to compensate the operators for the time so spent was a violation of the Fair Labor Standards Act.

The court declared that driving the trucks was an indispensable part of the workers' activities and that a crew member who did the driving was entitled to compensation like any other truck driver. There was no claim that crew members who merely rode to work in the trucks were entitled to compensation for travel time.—*Mitchell v. Bateman & Whitsitt, Inc.*, 34 LABOR CASES ¶ 71,504.

Amend Seasonal Exemption for Handling of Fresh Produce

An amendment clarifying FLSA's seasonal exemption for packing, handling and preparing of fresh fruits and vegetables in their raw or natural state was announced recently by Charles T. Lundquist, acting administrator of the United States Labor Department's Wage and Hour and Public Contracts Divisions. The amendment makes it clear that the exemption ends when the commodities leave the packing houses or shipping sheds where they have been assembled. Subsequent wholesaling, repacking and in-transit handling are not exempt.

Books . . . Articles

CURRENT LITERATURE in the Labor Field

Labor Law Survey

Labor and the Law. Charles O. Gregory. W. W. Norton & Company, Inc., 55 Fifth Avenue, New York 3, New York. Second revised edition, 1958. 580 pages. $6.50.

This book provides a survey of the evolution of our labor laws and of unionism as it has been molded by legislation designed to foster, restrict or control it. The author, Charles O. Gregory, professor of law, University of Virginia, examines many important laws and cases in the United States. The propriety of various collective bargaining techniques is studied at length, as well as the considerations involved in organizational drives, the labor injunction, etc.

This new edition includes important up-to-date material on such topics as picketing and the Constitution, the National Labor Relations Act, right-to-work statutes, arbitration, and effects of the Taft-Hartley and Norris-LaGuardia Acts. The author seeks to bring to the fore the most significant and vital issues in the development of our labor laws and labor relations.

Professor Gregory notes that while the Taft-Hartley Act did not constitute a "Slave Labor Act," as the unions were once wont to call it, the act did introduce "some needlessly complicated provisions that have been difficult to understand and administer." Many of the act's innovations have proved to be impractical, the author states, and several questionable union activities have remained unchecked, either because the act failed to cover them or its provisions were badly drafted.

It is pointed out that abuses of union power, achieved through widespread organization, continue to be the sore spots. Professor Gregory states that whether effective regulatory legislation is possible to achieve is speculative. Perhaps abuses of the power created by combinations of workers are unavoidable. These serious issues are treated more as political issues than as economic ones, he declares. It is noted that politicians have very vague notions about drafting legislation of this kind, and the public has no real conception of the inherent difficulties in this area. The author hopes that his book will promote some general understanding of the problems involved in this field and, therefore, aid in the achievement of a more balanced legislative program of regulation.

NLRB Annual Report

Twenty-Second Annual Report of the National Labor Relations Board. Superintendent of Documents, United States Government Printing Office, Washington 25, D. C.

The National Labor Relations Board recently issued its annual report for the fiscal year ended June 30, 1957. It noted that 13,356 cases of all types were received, as compared with 13,388 cases filed during the preceding year. The number of unfair labor cases filed increased from 5,265 in fiscal 1956 to 5,506 in fiscal 1957. Representation cases filed during fiscal 1957 totaled 7,797, while 8,076 were filed in fiscal 1956. The Board closed 12,708 cases in fiscal 1957, leaving 4,416 cases pending—the highest pending caseload in five years.

In the realm of unfair labor practice cases, charges brought against employers continued to predominate during fiscal 1957. Charges against employers were filed in 3,655 cases, and charges against unions in 1,851 cases.

Filings of secondary boycott charges were the highest on record. In fiscal 1957 a total of 462 of these charges were filed. In

fiscal 1956, the highest year previously, 421 of these charges were filed.

In the field of representation cases, 6,764 petitions for elections were filed by unions during fiscal 1957, compared with 7,103 filed in fiscal 1956.

Labor Relations Case Book

Problems in Labor Relations. Benjamin M. Selekman, Sylvia Kopald Selekman and Stephen H. Fuller. McGraw-Hill Book Company, Inc., 330 West 42nd Street, New York, New York. Second edition, 1958. 702 pages. $8.

This Harvard Business School Case Book is for text or supplementary use in college courses in labor problems or for supplementary use in courses in collective bargaining. It makes available authentic cases drawn from the work of collective bargaining and used in labor courses at the Harvard Graduate School of Business Administration.

The cases are organized into three major categories: (1) shop problems or day-to-day administrative problems, (2) problems at the over-all bargaining table level and (3) problems affecting individual companies over a period of time sufficiently long to reveal the development of a cooperative relationship from conflict and hostility. The questions appended to each case suggest helpful clues for uncovering the problem and its requirements in action.

This revised edition describes recent significant events, such as the massive negotiations in steel and automobiles, as well as those in smaller industries. The authors emphasize power relations.

ARTICLES

Union Recognitional Activity . . . A study of the impact of the *Curtis* case (*Teamsters, Local 639*), 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 54,943, and the *Alloy* case (*Machinists, Lodge 942*), 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 54,960, will appear in the June issue of the *Virginia Law Review*. Entitled "The Curtis Case and Section 8(b)(1)(A) of the Taft-Hartley Act," the note explores some of the ramifications of the NLRB's new approach to labor union regulation.

The inroads made by the concept of free employee choice on traditional union economic coercion is the focal point of the note.

THE UNION QUEST FOR RECOGNITION IN GOVERNMENT SERVICE—

Continued from page 424

tially in the past decade. During World War II, state and local government employment fluctuated around 3 million; in 1956, employment averaged approximately 5 million. Federal employment has been reduced from its peaks during World War II and the Korean War. It has, however, averaged slightly over 2 million during the Eisenhower Administration. The combined government employment during 1956 was approximately 7.2 million. On all levels, employment will undoubtedly increase with the demands for education, welfare and defense spending.

Organizations among government employees have grown despite administrative opposition. Recent estimates by the Bureau of Labor Statistics indicate that 915,000 government employees belonged to unions in 1956—roughly 13 per cent of all government personnel. Of the 915,000, 669,000 were members of unions affiliated with the AFL-CIO and 247,000 were members of unaffiliated organizations.[19] In addition, an equal or greater number of government employees belong to "associations" functioning on a state or local government level.

Although the federal government first recognized the right of its employees to organize, innovations in the last decade in industrial relations have been made primarily by local government units. To overcome legal objections, the parties have generally adopted some variant of the traditional collective bargaining contract in order to establish a formal relationship. The number of these relationships has increased steadily and will probably continue to increase. Our state and federal governments should study these relationships before formulating industrial relations programs for their employees. **[The End]**

[19] The bureau's figures were rounded into the nearest thousand. See the predictions of a consultant on labor relations in public service, Edmond F. Kicketts, "Trends and Forecasts in Personnel," *Public Management*, January, 1955, pp. 9-11.

Rank and File

News of Work and Working People

Meetings of Labor Men

Western Pension Conference.—The first meeting of the newly formed Seattle Chapter of the Western Pension Conference was held on May 21 at the Washington Athletic Club in Seattle. Among the speakers was Walter Reynolds, assistant actuary of the Prudential Life Insurance Company, who spoke on certain aspects of the Teamsters' retirement plan, on which he has worked since its inception in 1955.

Practising Law Institute.—In cosponsorship with the American Arbitration Association, the institute will present "Arbitrating Disputes Under Labor Contracts" June 16-20 at the Hotel Statler, New York. The program will deal with grievance arbitration as distinguished from the arbitration of the terms to be written into a contract, and will make available a detailed analysis of arbitration procedures, problems and issues from the viewpoint of labor arbitrators.

American Management Association.—The personnel division of the AMA will hold a seminar on "Fundamentals of Labor Law for Industrial Executives" June 23-27 at the Hotel Astor in New York City. The seminar is designed to offer authoritative, thorough understanding of the labor laws affecting everyday operations of businessmen, and includes topics such as "What to Do When the Union Knocks at the Door" and "Living Under the Contract." For reservations contact the Seminar Registrar, American Management Association, Inc., 1515 Broadway, New York 36.

University of Michigan Law School.—A conference on "Collective Bargaining and the Law" will be held in cooperation with the Institute of Labor and Industrial Relations (University of Michigan-Wayne State University) July 31, August 1 and 2 in Ann Arbor.

Congressional Activity

While Congressional committees are busy studying important labor bills, several new ones have been introduced.

Hearings on proposed legislation in the labor-management relations field continue to be held by the Subcommittee on Labor Legislation of the Senate Committee on Labor and Public Welfare. Subcommittee Chairman John F. Kennedy pledged to bring out by early June a bill covering the following 11 areas: union elections, union finances, trusteeships, exemption of construction workers from bargaining elections, provisions for strikers to vote in bargaining elections, elimination of the non-Communist affidavit, secondary boycotts, use of middlemen in union-management negotiations, organizational picketing, state-federal jurisdiction, and conflict-of-interest cases. Chairman Kennedy has been quoted as stating that the subcommittee would not rush through any excessively restrictive measure.

The House Committee on Education and Labor is expected to appoint a special subcommittee to make a study of the Welfare and Pension Plans Disclosure Bill (S. 2888), which passed the Senate on April 28. This study will probably delay House action on the bill until late in this legislative year. (For a discussion of this bill, see last month's issue of the JOURNAL.)

The temporary unemployment compensation bill (H. R. 12065), which had been passed by the House, was reported without amendment by the Senate Finance Committee. The bill is a slightly modified version of the bill recommended by the Administration. Unemployed workers who have exhausted their benefit rights under state law would be paid additional benefits equal to one half of the total amount collected under the state law. The payments would be made

with respect to weeks of unemployment beginning before April 1, 1959, to individuals who exhausted their benefit rights after June 30, 1957. No benefits would be paid to unemployed individuals who were not covered under an unemployment compensation system. Benefits would be paid only in states that elect to participate in the program. The federal government would lend the money to the states for such payments under agreements between the states and the Secretary of Labor.

The AFL-CIO has charged that H. R. 12065 "meets neither the immediate nor the long-term needs" of unemployed workers. Nelson H. Cruikshank, director of the AFL-CIO Department of Social Security, stated that the Kennedy bill (S. 3244) would meet both short and long-term needs. The latter bill provides for unemployment reinsurance grants to the states.

Several labor bills were recently introduced in Congress. S. 3738 would amend the National Labor Relations Act by permitting the certification of a union in the building and construction industry without a representation election, and would permit strikers to vote in representation elections. The act would also be amended by H. R. 12330, which would subject unions to federal and state antitrust laws.

The Fair Labor Standards Act would be made applicable by S. 3750 to employees of employers engaged in the operation of taxicabs. Another bill (H. R. 12095) would exempt employees of certain radio and television stations from the maximum hours provisions of the act.

S. 3773 would amend the Labor Management Relations Act to permit employees who suffer losses by reason of union unfair labor practices to bring suit to recover such losses.

Standards with respect to the election of officers of labor organizations would be established by S. 3751.

H. R. 12214 would prohibit discrimination on account of age in employment affecting interstate commerce.

A federal labor court would be created by S. 3797. The court (United States Labor Court) would have jurisdiction over representation and unfair labor practice cases. The bill provides for the appointment of 15 judges. The chief judge would receive a salary of $23,000 per annum and each of the associate judges would receive $22,500. The court would be authorized to appoint 30 commissioners, whose basic compensation would be $19,000 a year. The chief judge would assign commissioners as the court's business required. The bill would vest the court with "exclusive jurisdiction to hear proceedings, render judgments, issue decrees including decrees granting injunctions, and issue certifications" under Sections 8, 9(b) and 10 of the National Labor Relations Act.

The American Bar Association favors the establishment of a federal labor court. However, the Committee on Labor and Social Security Legislation of the New York City Bar Association has expressed disagreement with the ABA's views. The New York committee's report on this subject states that separation of the prosecution and decisional function of the NLRB exists today. Thus, the main aim of the new proposal has already been achieved without establishing a labor court, the report declares. It also argues that the creation of a labor court might result in the scrapping of basic policies and procedures developed over the years by the NLRB in the labor-management field. New and uncertain policies might revive disputes over basic matters long since settled.

Pilot Hired During Strike Has No Permanent Claim to Job

An oral agreement which provided that a nonstriking pilot was to be employed by an airline as long as it remained in business was not enforceable.

A pilot made an oral agreement with an airline whereby he was to be employed by it as long as it remained in business, in return for his services during a pilots' strike. He continued in the airline's employ for some years following the strike and then was discharged. He brought an action to recover damages for the wrongful termination of his employment.

The Florida District Court of Appeal denied his claim, holding that the contract lacked consideration since it bound the airline only and could not be enforced against him if he decided that he wished to quit for a better paying job. Although the pilot contended that this employment prevented him from joining the pilots' union and that, therefore, he would have difficulty securing another job, the court declared that this factor did not constitute consideration in so far as the airline was concerned.— *Marshall Hope v. National Airlines, Inc.*, 5 CCH AVIATION CASES 17,866.

Arbitration

Decisions • • •

Developments

"Bumping" Subject of Arbitration

The question of what "bumping" privileges would be afforded to senior employees by a collective bargaining agreement should a layoff occur was considered at a recent arbitration proceeding. After finding that there was an arbitrable issue involved, the arbitrator (Burton B. Turkus) declared that an employee with six or more years of seniority who is to be laid off may "bump" an employee with less seniority in any job within any job group or classification which the senior employee is capable of performing.

The dispute involved an interpretation of paragraph 18.3 of the collective bargaining agreement which read in part as follows:

"18.3 Lay-offs shall be governed by seniority in the respective job groups. When rehiring shall commence, employees shall be recalled in reverse order in which they were laid off, that is to say, the oldest employee in point of service shall be recalled first. However, any employee with six (6) or more years of seniority shall have the right to any job on which an employee of lesser seniority is engaged, provided he has the skill and ability to perform the work involved."

The employer and the union disagreed as to what procedure should be followed if a layoff occurred. No layoff was anticipated at the time that the controversy arose. The employer contended that a theoretical question had been posed by the union and that the grievance machinery and arbitration procedure of the agreement were limited to the presentation and consideration of actual grievances which originate with an individual employee. The union argued that the broad arbitration and grievance clause involved here made any issue arbitrable. The clause stated:

"20.1 For the purpose of this Agreement, the term 'Grievance' means any dispute between the Company and the Union, or between the Company and any employee concerning the *effect, interpretation,* application, claim, or breach of violation of this Agreement." (Italics supplied.)

The instant controversy was concerned with the *interpretation* and *effect* of paragraph 18.3 and, thus, was considered to be a grievance.

The arbitrator noted that there was no question that if an employee has less than six years of service, he has seniority rights only within his job group (departmental seniority) in the event of a layoff. He would have no right to "bump" a junior employee in another job group. It was also clear that in the event of a layoff, a six-year man could "bump" a junior employee working in another job classification or job title (plant seniority) for which he possesses the requisite skill. The disagreement arose as to which employees, in the job classification or job title to which he is being transferred, the transferring employee has the right to "bump."

The employer argued that the transferring employee only had the right to "bump" the employee with the least amount of seniority in the job classification. It was contended by the union that the transferring employee could "bump" any employee who is junior to him in the job classification; that is, he could select the particular job within the job title from those positions held by employees junior to him. The arbitrator, after having analyzed the wording of paragraph 18.3, upheld the union's position. It was noted that it would be unjust and inequitable to have a senior man working at a particular job earning less money than junior men within the same job group.

In Future Issues . . .

Arbitration. The thousands of union-management negotiations which are forming, to a considerable extent, the future of our society are at the same time forming an industrial judicial system. Arbitrators are establishing fundamental principles for administering day-to-day industrial relations. The author of a forthcoming article slants his analysis of the grievance and arbitration process toward the lawyer—in fact, a good subtitle to the article might be: "Tips to the Lawyer Who Intends to Arbitrate." Even though the actual arbitration hearing may be informal—just as informal as the parties desire—preparations for the hearing should be as painstaking as those a good lawyer makes in readying his case for court. Arbitration cannot be brushed aside any longer, for there is developing a sort of common law of labor relations. This is an inevitable consequence of the large number of arbitration hearings and decisions.

Power Relations. At the recent meeting of the Industrial Relations Research Association, the subject of "power" was discussed quite frequently. The technological changes in production have brought about a social and economic change in our shops. The change from the master-servant status to the "almost equals" status and the growth of democratic institutions are bringing about significant changes in power relationships. This increases the need for the protection of the public interest, since the results of collective bargaining have become of greater importance to our economy than is recognized by our legislative framework. The interests of the public are not adequately protected, and it is necessary, this article holds, to devise adequate tools to protect the public interest in labor-management relations in order to preserve voluntarism and to retain the benefits of industrial democracy.

The Railroads. A forthcoming article discusses labor's role in this declining industry. This decline has been given cognizance by a subcommittee of the Senate Committee on Interstate and Foreign Commerce. The railroad's financial position is in a precarious state; and because of the drastic decline in their financial condition, the railroad unions are also in a fairly critical condition. "If ever the time were ripe for the railroad managements and unions to get together to discuss their mutual problems, now is the time. There is no need for either side to attempt to place any blame. Both sides need only assay the possible consequences of inaction."

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